

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**ATLANTIC CITY ELECTRIC COMPANY,**

**Employer,**

**and**

**INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS, LOCAL 210,**

**Petitioner.**

**Case No. 04-RC-221319**

**ATLANTIC CITY ELECTRIC COMPANY'S REQUEST FOR REVIEW OF THE  
ACTING REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION**

Jonathan C. Fritts  
Morgan, Lewis & Bockius LLP  
1111 Pennsylvania Avenue, NW  
Washington DC 20004  
T: (202) 739-5867  
E: [jonathan.fritts@morganlewis.com](mailto:jonathan.fritts@morganlewis.com)

Julia S. Sturniolo  
Morgan, Lewis & Bockius LLP  
1701 Market Street  
Philadelphia, PA 19103-2921  
T: (215) 963-4782  
E: [julia.sturniolo@morganlewis.com](mailto:julia.sturniolo@morganlewis.com)

Dated: July 23, 2018

*Counsel for the Employer  
Atlantic City Electric Company*

## **TABLE OF CONTENTS**

	<b>Page</b>
I. SUMMARY OF ARGUMENT .....	1
II. BACKGROUND .....	6
III. FACTS .....	7
IV. ARGUMENT .....	11
A. Standard of Review .....	12
B. The Regional Director Ignored Record Evidence and Misapplied the Law in Finding that System Operators Do Not Have the Authority to Assign and Responsibly Direct Employees .....	13
1. The System Operators Assign Work Using Independent Judgment.....	13
a. Location .....	14
b. Time .....	18
c. Significant Overall Tasks.....	19
d. Independent Judgment .....	20
2. The Regional Director’s Reliance on Other Utility Industry Cases Is Misplaced Given the Record in this Case .....	22
3. System Operators Have the Authority to Responsibly Direct Employees.....	24
4. The Regional Director Misapplied Existing Board Law and Applies an Overly-Narrow Construction of Accountability in Evaluating Responsible Direction.....	27
C. The Regional Director Ignored Record Evidence and Misapplied the Law When Evaluating Secondary Indicia of Supervisory Status .....	28
1. The Regional Director Failed to Consider the Ratio of Supervisors to Rank-and-File Employees.....	29
2. The Decision Failed to Consider the System Operators’ Full Compensation .....	30
D. Compelling Reasons Support a Return to the Board’s Rationale in Big Rivers Corp .....	30
E. Compelling Reasons Support Abandonment of the Board’s Restrictive Principles Regarding Supervisor Status, and Adoption of Principles that Would More Fairly Reflect the Requirements in Section 2(11) .....	35
V. CONCLUSION.....	38

## **TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>Arizona Pub. Serv. Co. v. NLRB</i> , 453 F.2d 228 (9th Cir. 1971) .....	17, 18, 26, 31
<i>Arlington Masonry Supply, Inc.</i> , 339 NLRB 817 (2003) .....	13, 15
<i>Armour &amp; Co.</i> , 40 NLRB 1332 (1942) .....	6
<i>Big Rivers Corp.</i> , 266 NLRB 380 (1983) .....	<i>passim</i>
<i>Buchanan Marine, L.P.</i> , 363 NLRB No. 58 (Dec. 2, 2015) .....	17, 35
<i>Chi LakeWood Health</i> , 365 NLRB No. 10 (2016) .....	<i>passim</i>
<i>Community Education Centers, Inc.</i> , 360 NLRB 85 (2014) .....	28
<i>Croft Metals</i> , 348 NLRB 717 (2006) .....	24
<i>D&amp;T Limousine Service, Inc.</i> , 328 NLRB 769 (1999) .....	29
<i>Entergy Mississippi</i> , 357 NLRB 2150 (2011) .....	22, 24, 34, 35
<i>Entergy Mississippi, Inc. v. NLRB</i> , 810 F.3d 287 (5th Cir. 2015) .....	22, 31, 33, 35
<i>Essbar Equipment Company</i> , 315 NLRB 461 (1994) .....	29
<i>Globe Machine &amp; Stamping Co.</i> , 3 NLRB 294 (1937) .....	6
<i>Lakeland Health Care Assocs, LLC v. NLRB</i> , 696 F.3d 1332 (11th Cir. 2012) .....	27

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page(s)</b>
<i>Little Rock Hardboard Co.</i> , 140 NLRB 264 (1962) .....	31
<i>Maine Yankee Atomic Power Co.</i> , 243 NLRB 319 (1979) .....	32
<i>Maine Yankee Atomic Power Co. v. NLRB</i> , 624 F.2d 347 (1st Cir. 1980) .....	32
<i>Mississippi Power &amp; Light</i> , 328 NLRB 965 (1999) .....	32, 33, 34
<i>Monogahela Power Co. v. NLRB</i> , 657 F.2d 608 (4th Cir. 1981) .....	32
<i>Monongahela Power Co.</i> , 252 NLRB 715 (1980) .....	32
<i>Mountaineer Park, Inc.</i> , 343 NLRB 1473 (2004) .....	15, 18
<i>NLRB v. Detroit Edison Co.</i> , 537 F.2d 239 (6th Cir. 1976) .....	31
<i>NLRB v. Kentucky River Cmty. Care, Inc.</i> , 532 U.S. 706 (2001) .....	21, 33, 34
<i>NLRB v. NSTAR Elec. Co.</i> , 798 F.3d 1 (1st Cir. 2015) .....	22
<i>NLRB v. Prime Energy Ltd. P’ship</i> , 224 F.3d 206 (3rd Cir. 2000) .....	16, 17, 26
<i>Oakwood Healthcare, Inc.</i> , 348 NLRB 686 (2006) .....	<i>passim</i>
<i>In re The Pearson Bros.</i> , 199 NLRB 1179 (1972) .....	16
<i>Pepsi-Cola Co.</i> , 327 NLRB 1062 (1999) .....	16
<i>Public Service of Colorado v. NLRB</i> , 271 F.3d 1213 (10th Cir. 2001) .....	33

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page(s)</b>
<i>RCC Fabricators, Inc.</i> , 352 NLRB 701 (2008) .....	27
<i>W. Penn Power Co. v. NLRB</i> , 337 F.2d 993 (3rd Cir. 1964) .....	32
 <b>Statutes</b>	
29 U.S.C. § 152(11) .....	13
 <b>Other Authorities</b>	
29 C.F.R. § 102.67(d) .....	12, 13, 28
Reliability Standard PER-003-1 .....	20

Pursuant to Section 102.67 of the National Labor Relations Board (“Board” or “NLRB”)’s Rules and Regulations, Atlantic City Electric Company (“ACE” or the “Company”) respectfully requests review of the Acting Regional Director (“Regional Director”)’s Decision and Direction of Election dated June 15, 2018 in Case No. 04-RC-221319 (the “Decision”). A true and correct copy of the Decision is attached as Exhibit A. The Decision improperly concluded that ACE had not met its burden to show that the Company’s System Operators and Senior System Operators (collectively “System Operators”) are supervisors under Section 2(11) of the National Labor Relations Act (“Act” or the “NLRA”).<sup>1</sup>

## **I. SUMMARY OF ARGUMENT**

The Board should grant ACE’s request for review because, in finding that System Operators are not supervisors, the Regional Director ignored dispositive record evidence that the System Operators have the authority to assign and responsibly direct employees and exercise independent judgment in doing so. As discussed further below, the Regional Director’s findings on substantial factual issues are clearly erroneous on the record, misapply extant law, and to the extent they could possibly be deemed to rely on existing law, present compelling reasons for reconsideration of Board policy.

**First**, the record evidence clearly establishes that the System Operators have the authority to assign ACE field crew employees. The System Operators make priority decisions from a central control room regarding when and where the field employees’ work must be performed, including what equipment can be moved offline for repairs or maintenance and which customers or locations will be serviced first. These decisions—which the System Operators can

---

<sup>1</sup> Senior System Operators are primarily responsible for the transmission system (above the 69,000 voltage level) and System Operators are primarily responsible for the distribution system (below 69,000 voltage level). (Tr. 17).

and do make without consulting any supervisor or manager—dictate the location, time, and work performed by field crew employees.

The Regional Director concluded that, although System Operators may have some downstream impact on employee assignments, System Operators ultimately have no authority to require *particular* employees to work the times, locations, or overtime assigned to them.

(Decision, 14-16). This conclusion is patently erroneous. The record evidence, for example, demonstrates that:

- System Operators have the authority to hold field crews beyond their shift and to authorize overtime by communicating directly with the field crews, without going through any other supervisor. (Tr. 159).<sup>2</sup>
- Upon the System Operator’s “say so,” additional off-duty field employees will be called in to provide additional staffing support, which can include overtime work. (Tr. 152-53).
- System Operators have the authority to assign field crews to go to a particular job or project. As one of the Union’s witnesses admitted, a System Operator can tell a “troubleman” (*i.e.*, a field employee) to go to a particular location, such as a hospital. (Tr. 241).
- System Operators can redirect specific field crews to other jobs in response to changing circumstances on the ground. (Tr. 126).
- System Operators write “switching instructions,” which are step-by-step assignments that particular field crews working on particular projects must follow in order to isolate or de-energize a piece of equipment. (Tr. 127).

Based on this and other record evidence discussed below, the Regional Director’s conclusion that System Operators have no authority to assign employees to a specific location, to reassign employees to other jobs, or to require that particular employees work overtime assigned to them is clearly erroneous on the record. (Decision, 15). Such a conclusion is not even internally consistent with the Regional Director’s own findings.

---

<sup>2</sup> Citations to the Hearing Exhibits are labeled as “Bd.” For Board Exhibits and “E.” for Employer Exhibits. Citations to the Hearing Transcript are labeled as “Tr.” Citations to the Regional Director’s Decision are labeled as “Decision.”

The Regional Director found that System Operators make “priority decisions” about where and when to direct field crew based on their independent assessment, but ultimately concluded that because the System Operators effectuate these assignments through field supervisors, the System Operators do not “assign” the work. (Decision 11, 15). In making this finding, the Regional Director ignored dispositive evidence that the System Operators have the final authority to decide the location, time, and work to be performed by the field employees, even where the field supervisor may disagree. (Tr. 138; 245; 248). As Shift Manager Jay Davis testified, “[S]ystem [O]perators have that ultimate authority to say, yes, it has to get done.” (Tr. 248). Indeed, the Regional Director found that System Operators are accountable where they fail to make these assignments. (Decision, 16) (System Operator was disciplined for failing to assign a new crew to complete a nuclear reactor test).

The Regional Director inappropriately minimized this evidence when he concluded that System Operators may have some “impact” on the need for overtime, the length of a particular job, or switching instructions used. (Decision, 16). The System Operators do not merely have an “impact” on those items. The System Operators are the *final authority* on those decisions, especially in outage or emergency situations. If a System Operator decides that a particular customer, location, or equipment is a priority, that decision alone dictates where the field crew must report to work. (Tr. 245) (explaining the System Operator has the ultimate authority to decide the priority of work). If the System Operators decide to require overtime, field employees must remain on the job. (Tr. 159). The mere fact that those directives may be communicated via a field supervisor or a dispatcher does not dilute the System Operators’ ultimate authority to determine these assignments. Moreover, the Regional Director’s efforts to avoid this conclusion



by shoe-horning these facts into inapposite cases where independent judgment was lacking is, as discussed below, a misapplication of existing Board case law. (Decision, 15).

**Second**, the Regional Director made similar material errors with respect to the System Operators' ability to responsibly direct other ACE employees. The Regional Director, for example, ignored wholesale evidence that System Operators responsibly direct the control room dispatchers, including but not limited to the following:

- In a typical, non-outage situation, the System Operator directs the dispatcher to call the crew to go from one location to another. (Tr. 116-17; 124-25).
- The Union's business manager admitted that System Operators direct the work of dispatchers. (Tr. 105) (When asked whether he understands that System Operators direct the work of dispatchers, Charles Hill admitted, "I guess I would have to").
- Collectively-bargained job descriptions further reveal that dispatchers:
  - "Help[ ] initiate the expansion of the restoration center and the mobilization of additional workforce *under the direction of the [System Operator]*." (E. Ex. 3, at p. 6, ¶ 1; Tr. 105) (emphasis added).<sup>3</sup>
  - "Receive[ ] and evaluate[ ] customer emergency calls, recommending or initiating corrective action *under the direction of the [System Operator]* when necessary." (E. Ex. 3, at p. 6, ¶ 3) (emphasis added).

The System Operators not only direct the work of the dispatchers, they are also *accountable* for ensuring that those directions are actually followed. (Tr. 128). If the dispatcher cannot execute the System Operator's instructions, for example, the System Operator is responsible for remedying the situation by obtaining additional field crew resources for the dispatcher or otherwise resolving the issue. (*Id.*).

Similarly, System Operators create step-by-step switching instructions for field crews and redirect them to handle specific tasks. As the record demonstrates, the System Operators are accountable for the performance of field crew as part of the Company's performance

---

<sup>3</sup> "Power System Controllers" is a legacy name for the System Operator position. (Tr. 168).

accountability system, which takes into account reliability, safety, and cost efficiency, among other metrics. (Tr. 127). As the Decision recognizes, the System Operators conduct field audits to confirm that this “switching and tagging” work is being handled accurately. (Decision 12; Tr. 184-86).

Despite this record evidence, the Regional Director found that the System Operators do not responsibly direct field crews because there was insufficient evidence of System Operators receiving formal discipline due to field crew errors. (Decision, 15). In so holding, the Regional Director again ignored significant record evidence that the System Operators’ performance and compensation are both impacted by the performance of the field crews they direct. (Tr. 127; 186-87; 218-219; E. Ex. 9) (discussing performance reviews); (Tr. 156-57; 160-61) (discussing bonuses, which include a metric for regional/field performance). In addition, the Regional Director ignored evidence of a situation in which the field crew erred by failing to contact the System Operator before proceeding with “switching” work, which resulted in verbal coaching of the System Operator. (Tr. 192; 204 E. Ex. 10). Moreover, the Regional Director’s conclusion that accountability can only be established via formal discipline is, as discussed below, contrary to extant case law.

**Third**, this case presents compelling reasons for reconsideration of an important Board rule or policy. It reveals the shortcomings in the Board’s more recent decisions involving Section 2(11) authority in relation to system supervisors in the utility industry, which warrant reinstatement of the principles adopted by the Board and the courts in *Big Rivers Corp.*, 266 NLRB 380 (1983), and its progeny. Here, for example, the record is undisputed that System Operators work without a higher-level supervisor more often than not. They are in the control room 24 hours a day, 7 days a week, but higher-level supervision is present only 50-55 hours a

week. (Tr. 213). It defies common sense to hold, as the Regional Director did, that there is a complete absence of supervisory authority, for the majority of each week, in the control room of a power company that serves over half-a-million customers. This result does not pass the “common sense” test articulated by former Chairman Miscimarra. *See Chi LakeWood Health*, 365 NLRB No. 10, slip op. at 5 (2016) (Miscimarra, dissenting).

More generally, the Regional Director’s Decision applies an array of doctrines and evidentiary principles to avoid a finding of supervisor status, even when the record contains uncontroverted and unrebutted evidence of Section 2(11) authority. These principles are irreconcilable with the Act and should be reconsidered and abandoned by the Board, as discussed further below.

## **II. BACKGROUND**

The petitioned-for unit involves a group of 18 System Operators who have overall responsibility for the management of ACE’s electrical system, covering roughly 547,000 customers in New Jersey. (Tr. 13-14). The System Operators work in a central control room 24-hours a day, 365 days a year to monitor the electrical grid. As discussed further below, they make critical decisions about staffing, safety, and resource allocation to both protect employees and to keep customers safely supplied with power.

On February 14, 2017, the International Brotherhood of Electrical Workers Local 210 (the “Union” or “Local 210”) filed a representation petition in Case No. 04-RC-193066 seeking an *Armour-Globe* election<sup>4</sup> to determine whether the System Operators wanted to join an existing unit of approximately 375 operation, production, and maintenance employees. The Board conducted a one-day hearing on February 28, 2017 in Philadelphia, PA, during which the

---

<sup>4</sup> *See Armour & Co.*, 40 NLRB 1332 (1942); *Globe Machine & Stamping Co.*, 3 NLRB 294 (1937).

Company and the Union presented evidence on whether the System Operators are supervisors within the meaning of Section 2(11) of the Act.<sup>5</sup> The Regional Director issued a Decision and Direction of Election on March 17, 2017, concluding that the System Operators were not supervisors. On March 27, 2017, the NLRB conducted an election in which the System Operators voted against representation by the Union.

On June 1, 2018, the Union filed another petition for an *Armour-Globe* election involving the System Operators in Case No. 04-RC-221319. Rather than hold another hearing, the parties stipulated to the facts contained in the testimony and exhibits from the prior hearing. The Regional Director issued a Decision and Direction of Election on June 15, 2018 adopting the prior 2017 decision. On June 25, 2018, the Region conducted an election in which the System Operators voted in favor of joining the existing unit represented by the Union.

### **III. FACTS**

ACE operates, maintains, and controls the transmission and distribution of electricity to over half-a-million industrial, commercial, and residential customers in New Jersey. (Tr. 13, 15). Electricity generated by the power plants is routed through a transmission system (known as the “transmission side” or “transmission work”) to an electrical substation. There, the voltage is converted to a lower voltage via a transformer so that it can be used by the consumer.<sup>6</sup> It then moves through the distribution system (the “distribution side” or “distribution work”), which routes power to electric customers. (Tr. 15, 19, 185). Both the transmission and distribution systems are managed through a central ACE control room, which has overall responsibility for the management of the electric system. (Tr. 15).

---

<sup>5</sup> Other issues discussed at the hearing are not the subject of this Request for Review.

<sup>6</sup> The transmission system carries between 69,000 volts and 500,000 volts. (Tr. 17). The distribution system handles similar work at a lower voltage level.

System Operators work within the control room to manage the electric system. There are typically four or five System Operators on a shift, along with around three dispatchers, a position that is part of the existing Local 210 bargaining unit. (Tr. 163-4). The record establishes the System Operators report in to shift manager, Jay Davis, who testified he is in the office about 50-55 hours a week. (Tr. 163; 213). On nights and weekends, the System Operators work without other supervision and do not need to a shift manager to make decisions. (Tr. 210-211; 213; 218). In other words, “[o]ut of a 168-hour week, for the other [approximately] 120 hours the highest level individual would be a senior system operator in the room.” (Tr. 218). Thus, for 70% of any given week, System Operators serve, without other supervision, as the highest level authority in the control room. (Tr. 218).

The System Operators are responsible for both maintaining the system, and also directing switching for isolating parts of the system (*i.e.*, deenergizing portions of the grid by opening and closing circuit breakers and switches) so that work can safely be completed by the approximately 300 field employees on a typical shift. (Tr. 18; 133; 164). System Operators control the electric system to allow other employees to perform construction and maintenance work, to assure grid reliability of the bulk transmission and distribution system, and to restore power to customers as quickly as possible. (Tr. 19-20). In deciding what portions of the system can be taken offline or should be prioritized for repairs, the System Operators must balance multiple factors—including but not limited to—safety, customer demand, whether critical care facilities or other priority customers are impacted (*e.g.*, hospitals), how many field employees are available to be dispatched, the amount of time needed for the repairs, and the integrity of the electric system. (Tr. 28-29; 118; 169-70). They are also responsible for monitoring the stability of the entire system and to take independent actions to prevent against overload and blackouts. (Tr. 19-20).

By way of examples of this work, System Operators decide whether to disconnect large amounts of customers to prevent the system from overloading; whether a field crew or “troublemen” should make a permanent repair or a temporary repair (which determines the length of time a particular crew will be working at a particular location); and how work crews should be allocated, including whether a particular job requires more than one crew. (Tr. 118-123). In other words, the System Operators prioritize work and make decisions about the resulting crew assignments, including deciding whether overtime is needed. (Tr. 152-153). As Michael Sullivan, Vice President of Electric and Gas Operations, testified, “they prioritize what we’re going to do and when will they do it.” (Tr. 119).

System Operators also direct field employees via switching instructions to de-energize a particular piece of equipment. “Switching” is a term for the sequential steps the field crew must take to manually isolate a section of power lines by interrupting the electric flow, which in turn removes the current from the equipment and allows it to be worked on safely. (Tr. 127). The System Operators are also responsible for preparation, accuracy, and issuance of clearance orders to authorize such “switching” work. (Tr. 207-208). Field crews are expected to follow those instructions, and System Operators have accountability for the performance of these instructions. (Tr. 127) (“Q: Are the system operators accountable for the decisions [crews] make? A: Absolutely”).

Although there are guidelines and training, the System Operators’ work is not bound by rigid rules or approval processes, and they can independently make decisions to protect the system without obtaining approval from their shift manager. (Tr. 126; 174). System Operators may deviate from these guidelines as frequently as once per week, depending on the particular situation encountered. (Tr. 212). Some System Operator guidelines even have an express

disclaimer that there may be circumstances where it is “desirable or even necessary to deviate from these guidelines at the [S]ystem [O]perator’s discretion or at the discretion of PJM.” (Tr. 172; E. Ex. 5, at 1).<sup>7</sup> Neither field supervisors, nor the dispatchers or field crew, have authority to override what the System Operators indicate they need in terms of priority or staffing resources. (Tr. 138; 244-45; 247-49).<sup>8</sup> These other positions lack the “situational awareness” of a System Operator, who alone has the best knowledge and skill to make the right judgments to ensure the reliability of the power grid. (Tr. 247).

Some of this work is planned and other work requires an emergency response. On so-called “blue sky” days, the Company focuses on expanding, maintaining, and generally operating the electric system. (Tr. 16). The System Operators will decide, for example, the right time of day to take a piece of equipment offline for routine maintenance and to ensure the work can be performed safely and will not cause overloads on other circuits. (Tr. 129-131). Even on clear days, unexpected developments can arise (*e.g.*, hot weather or unexpected outage of another piece of equipment), and the System Operators can and do make independent, real-time decisions balancing the integrity of the system and the need for maintenance, including cancelling a planned outage for the day. (Tr. 131; 175-76; 178; E. Ex. 8).<sup>9</sup> They can also independently deny requests for new projects or work if, in their judgment, the work cannot be accommodated. (Tr. 176-77; E. Ex. 7). Shift manager Jay Davis testified that System Operators cancel work roughly every 3-4 weeks. (Tr. 215).

---

<sup>7</sup> The System Operators are also responsible for interfacing with PJM, a regional transmission organization that coordinates the movement of electricity across 13 states. (Tr. 146-48).

<sup>8</sup> An exception to this rule exists for safety issues. Any individual at ACE can stop any job or refuse to do any work as a result of safety concerns. (Tr. 146).

<sup>9</sup> In contrast, bargaining unit members must inform the System Operators if they cannot do a job due to lack of material or equipment. (Tr. 207).

When bad weather impacts the grid, the System Operators will free-up, prioritize, and allocate field resources to do restoration work for outages. (Tr. 16-17). In those settings, System Operators have to take quick, independent action to protect the security of the grid. (Tr. 19). They must prioritize safety and the reliability of the electrical grid in deciding where and when to assign field employees. (Tr. 118-119). They are, for example, responsible for ensuring customers with outages receive attention, and they also must manage the system to avoid blackouts or cascading outages due to the burden on the rest of the system. (Tr. 19-20). They have authority to assign additional crews and authorize overtime as needed to address these responsibilities. (Tr. 120; 152-53; 159).

Once the System Operators prioritize the work, the ACE dispatchers (who are included in the existing bargaining unit) will actually effectuate the dispatch of the work to the field in accordance with the decisions made by System Operators. (Tr. 134-35). For smaller outages, the dispatchers themselves can allocate crews to do work, but when there are decisions to be made about the prioritization of work and the allocation of resources in an outage, those decisions can only be made by the System Operators. (Tr. 137). In either case the System Operators make the decisions about what work will be assigned and in what order.

#### **IV. ARGUMENT**

The Board should grant review and reverse the Regional Director's Decision because the findings on substantial factual issues are clearly erroneous on the record. The Regional Director ignored relevant facts and failed to consider the entire record, which when taken as a whole, establishes that System Operators can and do exercise supervisory authority to assign and responsibly direct other ACE employees, using independent judgment. Instead, the Decision cites in rote fashion earlier utility industry decisions, applying them in an inappropriate manner that reflects a significant departure from the Board's existing standards. Indeed, the legal



conclusions reached by the Regional Director contradict the very factual findings made in the Decision itself.

To the extent the standards in existing case law could possibly be deemed to require the Decision reached by the Regional Director, significant policy considerations weigh in favor of reconsidering those standards. The System Operators monitor and control an electrical grid for over half-a-million customers, including critical institutional customers such as hospitals. Furthermore, they are responsible for the reliable operation of the bulk transmission system in New Jersey, a critical component of the interconnected U.S. power grid. They work around-the-clock to ensure the safety and security of the system, frequently by making decisions about how to assign and direct front-line crews and field resources. They are responsible for managing competing demands on the field employees (who are in the bargaining unit), particularly in an outage, and prioritizing the work they perform. When higher-level management are not in the control room—as is the case for over 100 hours a week—the System Operators are the highest-level supervisors making these decisions. In essence, the Regional Director concluded that there is no supervisor in the control room for the vast majority of the week, a result which simply defies common sense. Accordingly, the Board should grant review and reverse the Regional Director’s Decision, as discussed further below.

**A. Standard of Review**

Under Section 102.67(d) of the Board’s Rules and Regulations, a Request for Review should be granted on the following three grounds, each of which is present in this case: (1) the Decision is clearly erroneous on the record in a manner that prejudicially affects the Company’s rights; (2) the Decision raises a substantial question of law or policy because of the absence of or the departure from officially reported Board precedent; and (3) there are compelling reasons for

reconsideration of an important Board rule or policy. 29 C.F.R. § 102.67(d). As discussed further below, the Decision warrants review on all three grounds.

**B. The Regional Director Ignored Record Evidence and Misapplied the Law in Finding that System Operators Do Not Have the Authority to Assign and Responsibly Direct Employees.**

The record and the Regional Director’s own credibility determinations overwhelmingly demonstrate the System Operators are supervisors under Section 2(11) of the Act. Section 2(3) of the Act excludes any individual employed as a supervisor from the definition of an “employee,” and Section 2(11) of the Act defines a “supervisor” as

any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11). Because the statutory indicia set forth in Section 2(11) of the Act are stated in the disjunctive, the possession of *any one* of the indicia is sufficient to confer supervisory status. *Arlington Masonry Supply, Inc.*, 339 NLRB 817, 818 (2003).

Rather than considering the full record evidence in light of existing Board precedent, the Regional Director failed to evaluate the entire record and, instead, applied authority that is entirely inapposite. For these reasons alone, granting review is appropriate. 29 C.F.R. § 102.67(d).

**1. The System Operators Assign Work Using Independent Judgment.**

The Board defines assignment as the act of assigning employees to a place (*e.g.*, department or location), to a time (*e.g.*, shift or overtime), or giving “significant overall duties” or tasks to employees. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 689 (2006). If individuals

use independent judgment to assign other employees to a place, a time, *or* significant overall tasks, that person is a statutory supervisor. At ACE, the System Operators do all three.

a. *Location*

First, the System Operators are responsible for determining whether it is necessary to dispatch a field crew or troublemen to a particular *location* for repairs. In short, they have overall responsibility for balancing competing work priorities, particularly in response to real-time changing conditions during an outage, and they are solely responsible for prioritizing those competing needs. As the Regional Director recognized, the System Operators “make priority decisions about where to place resources, which might entail dispatching field employees” from one outage to another. (Decision, 11). They “may determine, based upon their assessment of conditions on the system that it is necessary to dispatch a field crew or troublemen to a location for repairs, and may even have input into how best to utilize field employees based upon their relative expertise . . . .” (Decision, 15). But because the Regional Director concluded that System Operators effectuate these assignments through the Field Supervisor, the Decision erroneously found that the System Operators do not “assign” the work. (Decision, 16).

As the full record demonstrates, however, the System Operators prioritize work at different locations to be completed by the field staff. They can and do require additional work crews to be dispatched to a particular site and will move crews from different geographic parts of the service territory to get more resources to a particular location, or reassign particular field employees to other locations based on circumstances “on the ground.” (Tr. 120; 123; 126; 247). The System Operators may also work with the field supervisor to decide which crew is best for particular projects, based on their qualifications and skills. (Tr. 137-38). As the Union’s own witness admitted on cross-examination, the System Operators can, for example, direct specific employees to go to a particular job or project. (Tr. 240-41) (acknowledging that System

Operators have the authority to tell a particular employee that a specific job or project needs to be addressed next). The Decision failed to consider or weigh this dispositive evidence.

The Regional Director further found that when there is a disagreement over the assignment of a particular field crew, the System Operators have the authority to direct and override the judgment of the field supervisors. (Decision, 11; *see also* Tr. 138; 245; 247-49). As the record demonstrates, this authority resides with the System Operator because they are in the best position to understand how to prioritize work over the entire electrical grid:

HEARING OFFICER MANN: Would a field supervisor not know on their own that they can go get a crew elsewhere?

[JAY DAVIS]: It has been my experience that previously that sometimes they are reluctant to do so. Field supervisors, in fact, they lack the situational awareness that a [S]ystem [O]perator has. And they may find that this piece of equipment or this line outage may not require—in their judgment may not be integral to the reliability of the power grid. However, the [S]ystem [O]perator has that knowledge and skill, and they are in a better position to make that judgment.

(Tr. 247).

When evaluating the System Operator’s authority to override the directives of the field supervisor, the Regional Director inappropriately disregarded this evidence of the System Operators’ supervisory authority, concluding “the record is unclear as to how often or in what circumstances this has occurred.” (Decision, 11). In so holding, the Regional Director ignored extant Board law that Section 2(11) of the Act requires only possession of authority to carry out an enumerated supervisory function – not its actual exercise. “It is the existence of the power which determines whether or not an employee is a supervisor.” *Arlington Masonry Supply, Inc.*, 339 NLRB at 818 (citing *NLRB v. Roselon Southern, Inc.*, 382 F.2d 245, 247 (6th Cir. 1967); *see also Mountaineer Park, Inc.*, 343 NLRB 1473, 1474 (2004) (“Significantly, it is not required that the individual have exercised any of the powers enumerated in the statute; rather, it is the

existence of the power that determines whether the individual is a supervisor.”); *Pepsi-Cola Co.*, 327 NLRB 1062, 1064 (1999) (rejecting Regional Director’s distinction between those individuals that had exercised supervisory authority and those that had not yet done so); *see also NLRB v. Prime Energy Ltd. P’ship*, 224 F.3d 206, 210 (3rd Cir. 2000) (“Once the existence of supervisory authority is established, the degree or frequency of its exercise is of little consequence”).

Section 2(11) of the Act “does not require the exercise of the power described for all or any definite part of the employee’s time. It is the existence of the power which determines the classification.” *In re The Pearson Bros.*, 199 NLRB 1179 (1972) (citing *Ohio Power Co. v. NLRB*, 176 F.2d 385, 388 (6th. Cir. 1949)); *see also Chi LakeWood Health*, at slip op. 3 (Miscimarra, dissenting) (“[T]he Board should not disregard un rebutted evidence ‘merely because it could have been stronger, more detailed, or supported by more specific examples’”) (internal citation omitted).<sup>10</sup>

Here, the absence of frequent disagreements between field supervisors and System Operators does not prove that the System Operators have only “sporadic” supervisory authority. (Decision, 5). Instead, it reflects that field supervisors—who are excluded from the unit as supervisors—ultimately must accede to the authority of the System Operators. Indeed, the absence of frequent disagreements between field supervisors and System Operators is attributable to the fact that the System Operators’ ultimate authority to make these decisions is well-understood. As shift manager Davis explained:

It’s uncommon because they [i.e. the field supervisors] shouldn’t be refusing system operation’s request to get work done. . . .

---

<sup>10</sup> Nothing in *Oakwood Healthcare*, *supra*, or subsequent cases compels a different conclusion. To the contrary, the Board in *Oakwood* explained that only “[p]ossession of the authority to engage in (or effectively recommend) any one of the 12 supervisory functions listed in Section 2(11) is necessary to establish supervisory status.” 348 NLRB at 689.

[T]hey understand that when we ring that bell to get a piece of equipment back in service, that it is for a legitimate reason.

(Tr. 249). The System Operators must ultimately have this central and final authority to make decisions concerning the assignment of the employees in the field, particularly in emergency or outage situations, because the field supervisors do not have the same perspectives on the needs of the entire system and the prioritization of all of the work that must be performed system-wide.

(Tr. 247).

System Operators have this authority and exercise it, as Davis explained, “judiciously.” *See Prime Energy Ltd. P’ship*, 224 F.3d at 210 (“The mere fact that the Regional Director found only one instance where a shift supervisor sent a plant operator home is hardly a reasonable basis to conclude that the authority was lacking. It simply suggests that the authority was rarely needed”); *Arizona Pub. Serv. Co. v. NLRB*, 453 F.2d 228, 231-32 (9th Cir. 1971) (finding supervisory authority when no employee ever failed to comply with the purported supervisor’s requests, even though requests may have been “couched in nondemanding terms”).

It defies common sense to hold, as the Regional Director did, that even though the System Operators have authority to determine (and override) the assignments made by field supervisors—who are indisputably statutory supervisors—the System Operators are *not* statutory supervisors. This would create a bizarre line of authority in which bargaining unit employees are supervised by field supervisors who are excluded from the unit, yet the field supervisors must take direction from System Operators who would be included in the same bargaining unit as the field employees according to the Regional Director’s Decision. *See Buchanan Marine, L.P.*, 363 NLRB No. 58, slip op. at 4-5 (Dec. 2, 2015) (Miscimarra, dissenting) (identifying three common-sense factors the Board must consider in conducting a realistic appraisal of the statutory indicia set forth in Section 2(11), so as to “avoid conclusions regarding supervisory status that

fail the test of common sense”—in other words, “[i]f one accepts the Board's finding that the disputed employees are not supervisors, does that produce a ludicrous or illogical result . . .”); *Chi LakeWood Health*, slip op. at 4 (Miscimarra, dissenting) (advising of the need for common-sense principles to guide the application of the factors of Section 2(11)); *see also Arizona Pub. Serv. Co.*, 453 F.2d at 233 (“The effective exercise of authority is nonetheless supervisory though it is passed on through another supervisory employee.”).

While it is clear that the System Operators, not the field supervisors, possess the ultimate authority to make work assignments, the evidence at a minimum demonstrates that the System Operators can “effectively recommend” assignments to the field supervisors. *See Oakwood Healthcare*, 348 NLRB at 689 (“It follows that the decision *or effective recommendation* to affect one of these—place, time, or overall tasks—can be a supervisory [assignment]”) (emphasis added). The Board typically interprets “effective recommendation” to mean that the recommended action is taken without independent investigation by superiors. *See Mountaineer Park, Inc.*, 343 NLRB 1473, 1474–75 (2004). Here, the System Operators’ decisions on crew dispatch to particular locations and particular times in an outage are not subject to further review but must, instead, be followed, even where the field supervisor disagrees. (Tr. 245; 247-49).

b. *Time*

Second, and as already referenced above, the System Operators also assign field employees to work at specific *times*, including the authority to require field crew to work overtime. The Regional Director’s Decision similarly recognizes and credits this testimony, finding that System Operators determine how long field employees work at a particular site. (Decision, 10). The Decision further acknowledges that “System Operators may conclude that overtime work is necessary or that certain jobs should be cancelled” but again finds that because this is effectuated indirectly through the field supervisor, no assignment occurs. (Decision, 15).

As the record demonstrates, the System Operators assign field crews to work at specific times in a number of ways. They will make the decision to call in employees who are currently off-duty, including by authorizing overtime. (Tr. 152-53). The System Operators can also cancel or postpone projects to another day. (Tr. 131; 175-76; 178; 245; E. Ex. 8).<sup>11</sup> The record further demonstrates that System Operators have the authority to authorize overtime for particular individuals and crews. As Michael Sullivan, Vice President of Electric and Gas Operations, testified:

There is planned overtime and scheduled overtime. There is also emergency overtime. If it is expected, the senior system operator or system operator will hold crews over. If they feel they need, they will do it without anybody except working with the crews directly to say you guys got to button this job up; I need you to stay two or three hours to get this work done, because we can't leave it.

(Tr. 159). The Regional Director's conclusion that "System Operators cannot require field employees to stay to finish work" is therefore clearly erroneous. (Decision, 12).

c. *Significant Overall Tasks*

Third, the System Operators assign to field employees significant overall tasks by directing crews to respond to repair situations and by issuing "switching instructions" and "clearance orders" to direct the workers to deenergize and isolate a particular line or equipment to permit work to be completed. (Tr. 127; 207). *See also Oakwood Healthcare*, 348 NLRB at 690 (referencing assigning an employee to restock shelves as an assignment of significant overall task). Those instructions are themselves mandatory. (Tr. 127). The Regional Director's

---

<sup>11</sup> The Decision is misleading in its reference to "permits." System Operators can deny requests for work regardless of whether a permit is required. (Tr. 210). In those circumstances where the work requires a piece of equipment to be deenergized, the System Operators will both approve the request for that work and also will prepare a permit or "clearance order" that creates the switching instructions to take an area or piece of equipment offline. (Tr. 207-208). Accordingly, the reference in the Decision to scenarios where there was "insufficient time to obtain a permit" (Decision, 11) means that the System Operator determined there was not time to prepare to do the work, or it was not a high enough priority to move other projects. (Tr. 209).



conclusion that crew leaders are the ones “carrying out the switching instructions” does not contradict or even speak to the System Operator’s ability to design and assign those tasks. (Decision, 12). Moreover, the Regional Director engaged in no material analysis as to whether the System Operators assign significant overall tasks.

d. *Independent Judgment*

Finally, the System Operators use independent judgment in exercising all of this authority. As with any highly-regulated utility, the System Operators follow guidelines and procedures in assigning work.<sup>12</sup> But extensive evidence at the hearing established that these are only general guidelines, and the System Operators regularly—as often as once a week—deviate from the written guidelines on the basis of their own, independent decision-making. (Tr. 28; 212). In fact, at least some of the guidelines contain an explicit disclaimer that “there may be special circumstances that may make it desirable or even necessary to deviate from these guidelines at the system operator’s discretion or at the direction of PJM.” (Tr. 171-172; E. Ex. 5). This is not only Company policy: There are federal regulations requiring System Operators to have the authority to unilaterally implement real-time actions to ensure the integrity of the system. *See, e.g.*, Reliability Standard PER-003-1 (Operating Personnel Credentials), *available at* [https://www.nerc.com/\\_layouts/15/PrintStandard.aspx?standardnumber=PER-003-1&title=Operating%20Personnel%20Credentials&jurisdiction=United%20States](https://www.nerc.com/_layouts/15/PrintStandard.aspx?standardnumber=PER-003-1&title=Operating%20Personnel%20Credentials&jurisdiction=United%20States) (requiring System Operators performing reliability-related tasks to hold NERC certification); NERC Certification Examination, at 2 (Feb. 13, 2017), *available at* [https://www.nerc.com/pa/Train/SysOpCert/System%20Operator%20Certification%20DL/Transmission%20Operator%20Certification%20Exam%20Content%20Outline\\_Feb\\_2017.pdf](https://www.nerc.com/pa/Train/SysOpCert/System%20Operator%20Certification%20DL/Transmission%20Operator%20Certification%20Exam%20Content%20Outline_Feb_2017.pdf)

---

<sup>12</sup> These guidelines establish, for example, the need to prioritize safety issues like downed wires. (Tr. 28-29).

(reflecting the need for certified operators to “[i]dentify, communicate, and direct actions if necessary to relieve reliability threats and limit violations.”).

Given all of this evidence, the Regional Director correctly concluded that System Operators must exercise independent judgment as part of their job duties:

System Operators are charged with the difficult task of directing the operation of the Employer’s distribution system and protecting its integrity, taking into account concerns for both individual and societal safety and security while constantly balancing needs and risks. They perform their duties by monitoring and prioritizing resources in conjunction with PJM and other regulatory authorities. To assist them, they employ a computerized energy management system and over 150 written guidelines detailing how to address issues which may occur. While the vast majority of their myriad decisions fall within those guidelines, they must occasionally deviate from them and use their professional judgment. But, as the Board stated in *Mississippi Power*, this judgment, which may be based upon their experience, expertise, training, or education, is not supervisory judgment unless it is exercised in relation to one of the 12 indicia of supervisory authority. *Oakwood Healthcare, supra, Mississippi Power, supra, Providence Hospital, supra.*

(Decision, 14-15) (*see also id.* at 10 (noting System Operators deviate from guidelines, “often a weekly occurrence”)).<sup>13</sup>

While the Regional Director correctly concluded that the System Operators exercise independent judgment, his finding that it is not related to any of the 12 indicia of supervisory authority is clearly erroneous. As discussed above, the record evidence demonstrates that the System Operators exercise independent judgment in assigning and responsibly directing work.

---

<sup>13</sup> To the extent the Decision could possibly be read to conclude that independent “professional judgment” is excluded from the definition of independent judgment required by Section 2(11), that view has been rejected by the Supreme Court. *See NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 715 (2001) (“What supervisory judgment worth exercising, one must wonder, does not rest on ‘professional or technical skill or experience’?”). As the Supreme Court made clear, it does not matter what “kind” of judgment is used. *See also Oakwood Healthcare*, 348 NLRB at 692 (noting existence of “independent judgment” does not turn on whether the judgment uses professional or technical expertise).

2. The Regional Director's Reliance on Other Utility Industry Cases Is Misplaced Given the Record in this Case.

The Regional Director cited *Entergy Mississippi*, 357 NLRB 2150 (2011), for the proposition that assignments based on geographic proximity were routine and insufficient to establish independent judgment. (Decision, 7, 15). Similarly, the Regional Director cited *NLRB v. NSTAR Elec. Co.*, 798 F.3d 1 (1st Cir. 2015) to highlight the lack of supervisory status where the purported supervisors' decisions were "controlled by detailed instructions and call-out procedures, and typically were geographically driven." (Decision, 15).

In this case, however, there is no proof that geographic proximity or rote application of pre-written instructions forms the basis of the System Operators' decisions. Unlike in *Entergy Mississippi* and *NSTAR Electric*, the System Operators here are *not* constrained by existing policies or guidelines.<sup>14</sup> Even the Union's own witness admitted that he exercises independent judgment within the general guidelines. (Tr. 239). As the Regional Director recognized, the System Operators must tackle the "difficult task" of using considerable independent judgment to evaluate "individual and societal safety and security while constantly balancing the needs and risks." (Decision, 14). Far from mere geographic proximity, System Operators must consider, weigh, and decide between a multitude of factors; such as safety (*e.g.*, downed wires), the nature of the customers impacted (*e.g.*, critical care facilities or hospitals), and efficiency considerations, as well as impact to the electrical grid itself. (Tr. 19-20; 28-29; 118; 167-70). Unlike the purported supervisors in *Entergy Mississippi* and *NSTAR Electric*, the System Operators must constantly balance various priorities and relative impacts.<sup>15</sup>

---

<sup>14</sup> And as discussed further, *infra* at fn. 20, *Entergy Mississippi* involved dispatcher positions, rather than System Operators.

<sup>15</sup> The Board's decision *Entergy Mississippi* was vacated and remanded because the Fifth Circuit concluded that the evidence showed that the dispatchers involved in that case arguably assigned field employees to various locations. *Entergy Mississippi, Inc. v. NLRB*, 810 F.3d 287, 297-98 (5th Cir. 2015) ("Evidence in the record shows that

Likewise, the Regional Director misapplied *Entergy Mississippi* regarding the ability of System Operators to assign overtime. In that case, the Board concluded the employer failed to present sufficient evidence of the authority to require overtime, explaining that the testimony was speculative, lacking in specificity, and insufficient. *Entergy Mississippi*, 357 NLRB at 2156. Here, in contrast, evidence regarding the System Operators' ability to authorize overtime or cancel planned work is far from speculative. (Tr. 152-53; 159; 244-45; 247-49). In fact, as the Regional Director found, System Operators can be *disciplined* for failing to hold workers over or failing to bring in a new crew after an existing crew "time[s] out." (Decision, 12 ("For example, the Employer provided evidence of one instance in which a field crew 'timed out' and the System Operator did not bring in another crew. . .[resulting in] a 'verbal censure[.]'")); Tr. 189-90). The record also establishes that the System Operators can require the field employee's direct supervisor to mandate assignments, even over the field supervisor's objection. (Tr. 245; 247).<sup>16</sup> As at least one other Regional Director has correctly recognized, "what is important in the instant case is the fact that the [individuals] have the authority to make the actual decision to have employees work overtime . . . . In this respect, [they] act much like higher level management which may decide the necess[ity] of working overtime and the numbers of employees needed, but leaving to lower level supervisors the determination of the specific employees to be assigned the overtime." *See* Decision and Order, Case No. 13-RC-20619 (Aug. 6, 2001), available at <https://www.nlr.gov/case/13-rc-020619>. The fact that the field supervisor

---

dispatchers' judgment about how to allocate Entergy's field workers is guided by a range of discretionary factors. . . . Accordingly, we vacate the Board's decision that dispatchers do not exercise 'independent judgment' when assigning employees to locations and remand for further proceedings").

<sup>16</sup> The Decision's conclusion that "System Operators cannot require field employees to stay to finish work" is therefore incorrect. Although the System Operator may need to go through an intermediary, the System Operators have the "ultimate authority" when disagreements in the field arise. (Tr. 247-49).

may need to *effectuate* that decision does not detract from the fact that the System Operator has authority to require the overtime.

The Regional Director's Decision should be reversed because the record evidence demonstrates that System Operators have authority to assign work and overtime, and that they exercise independent judgment in doing so. While the evidence on this one indicia of supervisory status is sufficient to reverse the Regional Director's Decision, it should be reversed also based on the evidence concerning the System Operators' responsible direction of other employees.

3. System Operators Have the Authority to Responsibly Direct Employees.

Under the Act, "responsibly direct" includes instructing employees on how to perform jobs properly and in what order. *See Croft Metals*, 348 NLRB 717 (2006) (finding leads "instruct employees how to perform jobs properly, and tell employees what to load first on a truck or what jobs to run first on a line to ensure that orders are filled and production completed in a timely manner"). The purported supervisor must also "be accountable for the performance of the task by the other [employee] such that some adverse consequence may befall the one providing the oversight if the tasks . . . are not performed properly." *Oakwood Healthcare*, 348 NLRB at 691-92. At ACE, the System Operators responsibly direct both the control room dispatchers and the field crew employees.

Here, and as noted above, the System Operators create step-by-step switching instructions for field crews and redirect them to handle specific tasks, particularly in an outage, and they are held accountable for how they direct field crews in carrying out their duties:

Q Can you give an example of what a switching instruction would entail?

A Say you're at a small substation. You might have to isolate a piece of equipment, a transformer, place grounds, put tags

on. There's a whole set of instructions that they would do, that they would go through to make a piece of equipment safe, isolated so that it can be worked on. Just as an example, switching instructions are things that the senior operators -- or the senior system operators or the system operators would provide.

Q Are crews expected to follow those instructions?

A They are.

Q Are system operators accountable for the decisions they make?

A Absolutely.

Q In what way are they accountable?

A They are part of -- they have a performance accountability system that we have for all the management employees. They are rated on their performance in reliability and safety, cost efficiency, all those kinds of areas.

(Tr. 126-127). If crews do not complete work as assigned, or if power otherwise takes too long to restore, the System Operator is the individual responsible. (Tr. 122; 189-93). Indeed, as referenced above, the Union's own witness acknowledged that he has the ultimate authority to direct an employee to a particular task or project. (Tr. 241). And as the Decision recognizes, the System Operators also conduct field audits to confirm that this "switching and tagging" work is being handled accurately. (Decision, 12; Tr. 184-86).

Contrary to this record evidence, the Regional Director found that the System Operators do not responsibly direct field crews because there was insufficient evidence that System Operators are held accountable for field crew or dispatcher errors. (Decision, 12). In so holding, the Regional Director again ignored and failed to evaluate significant record evidence. The Company presented dispositive testimony that the System Operators' performance and compensation are both impacted by the performance of the field crews they direct. (Tr. 127;

186-87; 218-219; E. Ex. 9) (discussing performance reviews); (Tr. 156-57; 160-61) (discussing bonuses, which include a metric for regional/field performance). For example, as part of the performance accountability system, the Company evaluates whether the System Operators have fewer than 25 “permit and tag errors” by the field crew in the System Operator’s region. (Tr. 186-87; E. Ex. 9, at 2 of 9).<sup>17</sup> The form makes clear that such field crew errors are separate and apart from accountability for the System Operator’s own errors, for which they have a threshold of *zero* incidents. (*Id.*). The Employer also presented additional evidence not mentioned in the Decision whatsoever, including an example where the field crew erred by failing to contact the System Operator before proceeding with “switching” work, which resulted in verbal coaching of the System Operator. (Tr. 192; 204 E. Ex. 10). Finally, as discussed above, the absence of discipline reflects only that employees recognize the System Operators’ authority and do not refuse their directions. *NLRB v. Prime Energy Ltd. P’ship, supra*; *Arizona Pub. Serv. Co. v. NLRB, supra*.

The Decision further fails to weigh or evaluate evidence that the System Operators responsibly direct the control room dispatchers. Per the Union’s testimony, ACE and Local 210 were involved in negotiating job descriptions for the ACE dispatcher positions under Local 210’s jurisdiction. (E. Ex. 3, at 4, 6). Those job descriptions reflect that dispatchers mobilize additional workforce and recommend or initiate corrective action to address customer emergency calls *under the direction of the System Operator*. (E. Ex. 3, at 6). Such job descriptions are relevant to the determination of supervisory status, particularly where corroborated by the Union’s own testimony:

Q Did you understand that power system controllers [*i.e.*, System Operators] directed the work of the dispatchers?

---

<sup>17</sup> Permit and tag errors are errors made in the process of deenergizing or reenergizing a piece of equipment.

A I guess I would have to because that's what it says there.

(Tr. 105). *See, e.g., RCC Fabricators, Inc.*, 352 NLRB 701, 724, n.1 (2008) (“Nothing in this line of cases suggests that company-issued job descriptions or titles are irrelevant”); *see also Lakeland Health Care Assocs, LLC v. NLRB*, 696 F.3d 1332, 1345 (11th Cir. 2012) (“[W]ritten policies, job descriptions, performance evaluations, and the like, when corroborated by live testimony or other evidence, are obviously relevant to the issue of responsible direction”).

The System Operators, moreover, are also *accountable* for ensuring that those directions are actually followed. (Tr. 128). If the dispatcher cannot execute the System Operator’s instructions, for example, the System Operator is responsible for remedying the situation by obtaining additional field crew resources for the dispatcher or otherwise resolving the issue. (*Id.*). It is beyond dispute that a dispatcher could also have an impact on reliability, safety, and cost efficiency of the grid, all of which impact the System Operators’ performance evaluation and bonus payments. (Tr. 127; 156-57; 160-61) (*see also* Decision, 6 (recognizing the inherent impact of dispatcher work on the “well-being and safety of the public and employees”)). The Regional Director’s failure to consider or even address this evidence of the System Operators’ responsibility and accountability in directing the dispatchers, is itself a serious error that warrants review.

4. The Regional Director Misapplied Existing Board Law and Applies an Overly-Narrow Construction of Accountability in Evaluating Responsible Direction.

The Regional Director further erred by holding the System Operators must formally discipline field employees or dispatchers in order to “responsibly direct” them. (Decision, 12 (noting there is no evidence System Operator audits result in discipline to field employees or dispatchers)). Such a reading of “accountability” is overly narrow. *See Oakwood Healthcare*, 348 NLRB at 692 (requiring only “the authority to take corrective action, if necessary” to



establish responsible direction); *Community Education Centers, Inc.*, 360 NLRB 85 (2014) (“[T]he threshold of corrective action for purposes of demonstrating responsible direction falls below that of other Section 2(11) indicia, including disciplinary and promotion authority”). The record clearly demonstrates that System Operators have the authority to “take corrective action” and are responsible for ensuring their priorities and switching instructions are actually carried out (*see, e.g.*, Tr. 128-29 (discussing System Operator responsibilities if field crew are not dispatched as directed)).<sup>18</sup> And, as discussed above, the System Operators themselves face material adverse consequences on their performance review and compensation (in addition to actual discipline) if the field crew and dispatchers are not properly managed. The Decision again errs by requiring formal discipline at the System Operator level as well. (Decision, 12). *See Oakwood Healthcare*, 348 NLRB at 692 (requiring only “a *prospect* of adverse consequences for the putative supervisor” arising from his or her direction of other employees to establish responsible direction) (emphasis added)).<sup>19</sup> The Regional Director, accordingly, misconstrued and misapplied the law by requiring some undefined volume of formal discipline to establish responsible direction.

**C. The Regional Director Ignored Record Evidence and Misapplied the Law When Evaluating Secondary Indicia of Supervisory Status.**

The Decision also failed to evaluate relevant record evidence concerning the secondary indicia of supervisory status. Under the Board’s own Rules and Regulations, review is warranted under such circumstances. 29 C.F.R. § 102.67(d).

---

<sup>18</sup> At a bare minimum, the record conclusively establishes that System Operators can effectively recommend discipline for field crew and dispatchers to their supervisors (Tr. at 153-54) (noting that field crew and dispatchers will be disciplined for failing to follow System Operator instructions, which the System Operator would accomplish by reporting the issue to the individual’s manager).

<sup>19</sup> Moreover, and as discussed above, the record evidence demonstrates that the System Operators exercise independent judgment in responsibly directing this work.

1. The Regional Director Failed to Consider the Ratio of Supervisors to Rank-and-File Employees.

It is well-established that the Board considers the ratio of supervisors to rank-and-file employees and, where that ratio is *unrealistic*, will undertake a practical evaluation. *See, e.g., D&T Limousine Service, Inc.*, 328 NLRB 769, 778 (1999) (holding individual was a supervisor where, if she were not, the employees at the facility would have no on-site supervision); *Essbar Equipment Company*, 315 NLRB 461, 466 (1994) (holding individual was a supervisor where he received slightly higher wages than field employees and, “[b]ut for him, there would have been no one at the site with any authority”). The Regional Director, however, failed even to consider or weigh this factor.

The record contains undisputed evidence that System Operators work without other supervision more often than not. They are in the control room 24 hours a day, 7 days a week, while higher-level supervision is there only 50-55 hours a week (Tr. 213). The conclusion that there is a complete absence of supervisory authority in the control room of a power company for extended periods of time—as former-Chairman Miscimarra has described it—cannot pass the “common sense” test. *See Chi LakeWood Health*, slip op. at 5 (Miscimarra, dissenting).

Regardless of whether other higher-level supervisors are present, the System Operators must have the unilateral authority to make real-time decisions in order to protect the safety of crews and provide service to over half-a-million customers. (Tr. 19). The System Operators do not need to call for approval to make decisions and there would be no time to do so for emergency situations. (Tr. 174).<sup>20</sup>

---

<sup>20</sup> The fact that the shift manager may be on call does not change the fact that System Operators are expressly authorized to take any necessary action to protect the system and can order and direct work and assignments without notifying the shift manager or receiving prior approval.

2. The Decision Failed to Consider the System Operators' Full Compensation.

Review is further warranted because the Decision fails to consider the System Operators' full compensation, entirely ignoring portions of the record. Instead, the Decision concludes that a senior dispatcher earns more than a System Operator "based upon straight time alone, and may earn even more if overtime is included." (Decision, 17). This conclusion turns a blind eye to undisputed evidence that System Operators are eligible for management-level bonus incentives, which dispatchers are not. (Tr. 156-157). Moreover, that bonus is based, in part, on how well the field resources under the System Operators perform, providing further evidence that the System Operators are accountable for crews working at their direction. (Tr. 160-161). The Decision mentions these bonuses (Decision, 13) but fails to evaluate or otherwise discuss them when examining the impact of the System Operators' compensation. (Decision, 17). This omission was improper, particularly where the Regional Director used the straight-time pay to justify the Decision. *See, e.g., Little Rock Hardboard Co.*, 140 NLRB 264, 265 (1962) (considering higher rate of pay as evidence of supervisory status, when compared with the pay of the production employees).

D. Compelling Reasons Support a Return to the Board's Rationale in *Big Rivers Corp.*

To the extent the Board concludes existing law requires the result reached by the Regional Director—which, as discussed above, it does not—compelling reasons exist for a change in policy. For over 15 years, the Board followed the well-reasoned opinion of *Big Rivers Corp.*, 266 NLRB 380 (1983) (holding electric company's system supervisors (1) responsibly

direct work in the execution of switching orders and (2) assign work to field employees).<sup>21</sup> As is relevant here, the Board's *Big Rivers* decision correctly held:

The fact that [system supervisors] may communicate through other supervisory personnel, particularly in the initial assignment of work, does not lessen the extent of their authority; nor does the fact that they are located in a facility which is some distance from the work being performed and have no visual observation of that work, since they are the ones who issue the orders and are responsible for their proper and safe execution. Moreover, since system supervisors are on duty 24 hours a day, 7 days a week, they often have the sole and complete responsibility for ensuring safe and continuous service to the Employer's customers, as there are no other supervisory personnel on duty in the power control center on weekends or after regular working hours.

266 NLRB at 383. The Board reached this conclusion following nearly half-a-century of near-unanimity by the federal appellate courts that individuals responsible for monitoring transmission and distribution systems are supervisors. *See, e.g., Arizona Pub. Serv. Co.* (holding the "system load supervisors ('SLDs') at issue were supervisors, concluding it was immaterial that some directions the SLDs gave field crew were routed through other individuals or couched in non-demanding terms); *NLRB v. Detroit Edison Co.*, 537 F.2d 239 (6th Cir. 1976) (concluding dispatchers are supervisors because they "have the discretion and responsibility, in fact, to weigh these various alternatives, determine the best course of action, initiate the orders to the various operating personnel in the field to carry out these orders, and then finally to see that the orders are, in fact, duly discharged and carried out"); *S. Indiana Gas & Elec. Co.*, 657 F.2d 878, 886

---

<sup>21</sup> The *Big Rivers* line of cases involve positions with job titles that vary across companies, including "dispatchers," "dispatch supervisors," and "system supervisors." Although these positions vary, they share responsibility for conveying switching instructions to field crew and are involved in calling out crews during outages or other emergencies. While the Company therefore discusses the relevant portions of those decisions, it is significant to note that the System Operators are distinct from the dispatchers at ACE. Instead, the System Operators are responsible for a broader geographic area and a broader array of responsibilities and discretion. (Tr. 116). Whereas the dispatchers can independently allocate crew resources as needed where there are available resources, it is the System Operators that must make decisions about prioritization issues where resources are limited. (Tr. 137). Therefore, as noted above, cases that find utility dispatchers lack supervisory authority because they rely on pre-established protocols or computer systems are inapplicable to System Operators, regardless of whether there is any change in the law. *See, e.g., Entergy Mississippi, Inc., supra.*

(7th Cir. 1981) (denying enforcement and commenting, “if these employees are not supervisors, then the Company’s entire electrical system operates without any supervision in the evenings, on weekends and in emergencies”).<sup>22</sup>

In 1999, the Board suddenly reversed course and overruled *Big Rivers Corp.*, holding that although distribution dispatchers and system dispatchers at issue may rely on “critical judgment” based on their expertise, know-how, or formal training; such judgment “does not, without more, constitute the exercise of supervisory judgment.” *Mississippi Power & Light*, 328 NLRB 965, 970 (1999) (citing *Providence Hospital*, 320 NLRB 717 (1996)).<sup>23</sup> The Board majority in *Mississippi Power & Light* found that the distribution and system dispatchers were merely “quasi-professional or quasi-overseer employee[s]” rather than true supervisors. *Id.* at 971. The majority speculated—without any specific citation—that the Board in *Big Rivers* “may have been swayed by the complexity of the dispatchers’ responsibilities and the adverse consequences to the well-being, safety, and lives of the public and employees that might result from...faulty decisions regarding switching sequences.” *Id.* at 969. The majority ultimately concluded that the dispatchers are governed by preexisting rules or by commonsense considerations when assigning priorities and that their role in calling-in additional employees is limited to relaying those requests to other dispatchers or on-call supervisors. *Id.* at 973. With respect to their involvement in issuing the switching sequences, the majority concluded that the judgment

---

<sup>22</sup> See also *Maine Yankee Atomic Power Co. v. NLRB*, 624 F.2d 347 (1st Cir. 1980) (denying enforcement of *Maine Yankee Atomic Power Co.*, 243 NLRB 319 (1979)); *Monongahela Power Co. v. NLRB*, 657 F.2d 608 (4th Cir. 1981) (denying enforcement of *Monongahela Power Co.*, 252 NLRB 715 (1980)); *W. Penn Power Co. v. NLRB*, 337 F.2d 993 (3rd Cir. 1964) (vacating the certification and denying enforcement of *W. Penn Power Co.*, 143 NLRB 1316 (1963)).

<sup>23</sup> The Board’s decision in *Mississippi Power & Light* leaves little room for dispute about the extent of its departure from the longstanding and well-tested rationale of *Big Rivers*. Indeed, the Board in *Mississippi Power & Light* conceded that, under the standard set forth in *Big Rivers*, the dispatchers at issue in *Mississippi Power & Light* would have been found to be statutory supervisors, having determined that the factual differences between the cases were “legally insignificant.” 328 NLRB at 968.

involved is “a function of the dispatchers’ own work, based on their training, knowledge, and experience and does not constitute the exercise of independent supervisory judgment.” *Id.* at 974.

Soon after *Mississippi Power & Light*, however, the U.S. Supreme Court overruled one of the foundations of the Board’s rationale, rejecting the notion that the use of professional and technical judgment is excluded from the definition of “independent judgment” for purposes of determining supervisory status. *See Kentucky River Cmty. Care*, 532 U.S. at 715-16 (“*Kentucky River*”) (calling the Board’s construction a “startling categorical exclusion” and commenting, “[i]f the Board applied this aspect of its test to every exercise of a supervisory function, it would virtually eliminate ‘supervisors’ from the Act”).

Recognizing the fatal blow of *Kentucky River* to the logic of *Mississippi Power & Light*, two federal circuit courts soon refused to accept *Mississippi Power & Light* as valid authority. The Tenth Circuit in *Public Service of Colorado v. NLRB*, 271 F.3d 1213 (10th Cir. 2001), explained that the Board’s decision in *Mississippi Power & Light* “specifically trace[d] the standard that it applie[d] to the line of charge nurse cases overturned by *Kentucky River* [*Community Care*].” 271 F.3d at 1220 (citations omitted). Similarly, the Fifth Circuit in *Entergy Gulf States, Inc. v. NLRB* affirmed its view that the Board’s decision in *Big Rivers* remained the appropriate standard by which to assess the supervisory status of utility industry dispatchers. 253 F.3d 203, 208, 210 (5th Cir. 2001) (noting “neither the facts nor applicable law has changed since the NLRB declared [utility industry dispatchers] to be supervisors in 1983”).

Following the Supreme Court’s decision in *Kentucky River*, the Board again revisited the issue of supervisory status. In *Oakwood Healthcare*, 348 NLRB at 686, the Board clarified the meaning of several terms contained in Section 2(11) of the Act. Contrary to its conclusion in

*Mississippi Power & Light* that utility industry dispatchers' exercise of judgment based on professional experience or expertise did not constitute independent judgment for purposes of supervisory status, the Board in *Oakwood Healthcare* clarified that independent judgment *includes* judgment exercised as a result of an employee's professional expertise and experience, as long as that judgment is exercised, as here, in connection to one of the 12 indicia of supervisory authority. 348 NLRB at 693-94.

Despite the Supreme Court's decision in *Kentucky River*, the Board refused to return to the *Big Rivers* standard in 2011. Without any significant discussion, the majority summarily rejected a return to that standard:

Contrary to the Employer, we believe that a reversion to *Big Rivers*, *supra*, a case predating *Oakwood Healthcare* by over 20 years, is unwarranted. The former case was decided under a different standard for determining supervisory status than the one set forth in *Oakwood Healthcare* pursuant to the Supreme Court's guidance in *Kentucky River*. For the Board to revert to a standard that does not follow the principles set forth in *Oakwood Healthcare* would ignore the significant doctrinal developments in this area of law. We therefore reject that approach and apply the *Oakwood Healthcare* standard to the facts of this case.

*Entergy Mississippi*, 357 NLRB at 2154 (concluding under *Oakwood Healthcare* that the employer failed to establish that the dispatchers in that case were statutory supervisors).

As member Hayes pointed out in a sharp dissent, the majority's conclusion in *Entergy Mississippi* relies on an overly narrow reading of *Oakwood Healthcare*. See 357 NLRB at 2158 (Hayes, dissenting) ("As expressed in *Oakwood Healthcare*, the critical inquiry is whether the person delegated authority to direct and oversee the performance of a task by other employees is accountable for the employees' success or failure in accomplishing the task for the employer. . . . *Oakwood Healthcare*, however, does not require that an 'adverse consequence' must be some formal discipline or even that every incident must result in an adverse consequence"). And as

the Fifth Circuit highlighted in its 2015 remand to the Board, the majority in *Entergy Mississippi* simply ignored evidence that the dispatchers in that case “assign” field employees to various places using independent judgment when balancing between competing outage demands.

*Entergy Mississippi, Inc.*, 810 F.3d at 297-98.

**E. Compelling Reasons Support Abandonment of the Board’s Restrictive Principles Regarding Supervisor Status, and Adoption of Principles that Would More Fairly Reflect the Requirements in Section 2(11).**

To the extent the Board concludes that the Regional Director’s Decision here is required by *Oakwood Healthcare*, the Board should recognize—as former-Chairman Miscimarra has explained—that the Board’s test for supervisory status has simply become “increasingly abstract” and removed from the “practical realities” of the workplace. As former-Chairman Miscimarra explained:

Consistent with the Board’s responsibility to apply the general provisions of the Act to the complexities of industrial life, I believe the Board must recognize that many businesses cannot function, as a practical matter, without having someone--or some reasonable number of people--exercising supervisory authority at a particular facility, during a particular shift, or in relation to a particular function.

*Buchanan Marine, L.P.*, slip op. at 4-5 (Dec. 2, 2015) (Miscimarra, dissenting). Consistent with the views expressed by former Chairman Miscimarra in *Buchanan Marine* and other cases, the Board’s evaluation of Section 2(11) authority in every case involving disputed supervisor status should include a consideration of three common-sense principles: “(i) the nature of the employer’s operations, (ii) the work performed by undisputed statutory employees, and (iii) whether it is plausible to conclude that all supervisory authority is vested in persons other than those whose supervisory status is in dispute.” *Id.* See also *Chi LakeWood Health*, slip op. at 4 (Miscimarra, dissenting). Such a common-sense approach here supports the conclusion that the System Operators are supervisors.



The Regional Director's Decision to the contrary is untenable. Moreover, it reveals the Board's increasing reliance on doctrines and evidentiary principles regarding Section 2(11) authority that are irreconcilable with the Act, which preclude a finding of supervisor status even when the record contains dispositive evidence of Section 2(11) authority. This unduly restrictive approach was applied by the Regional Director in this case, whose Decision summarized the applicable doctrines and principles as follows:

The Board analyzes each case in order to differentiate between the exercise of independent judgment and the giving of routine instructions; between effective recommendation and forceful suggestions; and between the appearance of supervision and supervision in fact. The exercise of some supervisory authority in a merely routine, clerical, or perfunctory manner does not confer supervisory status on an employee. . . . The authority effectively to recommend an action means that the recommended action is taken without independent investigation by supervisors, not simply that the recommendation is ultimately followed. . . . The Board has made clear that the proponent's evidentiary burden is significant and substantial, holding that purely conclusory evidence is not sufficient to establish supervisory status. . . .

The Board has an obligation not to construe the statutory language too broadly because the individual found to be a supervisor is denied the employee rights that are protected under the Act. . . . Where the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, the Board will find that supervisory status has not been established, at least on the basis of those indicia. . . . In order to meet the burden of proof, a party must show specific details and/or circumstances making clear that the claimed supervisory authority actually exists, and is not mere paper authority. . . . The sporadic exercise of supervisory authority is not sufficient to transform an employee into a supervisor. . . .

(Decision, 5).

When Section 2(11) was added to the Act as part of the Taft-Hartley amendments, Congress did not include any of the above qualifications in the definition of supervisor status. To the contrary, Congress articulated 12 different types of supervisory authority – any *one* of which was to be sufficient to result in supervisor status – and even when *none* of those indicia of

supervisory authority existed, Section 2(11) still requires a finding of supervisor status to the extent that an individual has authority “effectively to recommend” such action. Accordingly, the Board should find that the doctrines and evidentiary principles relied upon by the Regional Director are inconsistent with Section 2(11), on its face, and the Board should abandon those principles and overrule those decisions that have articulated and applied them.

Here, ACE does not leave the management of its electrical system unsupervised for a majority of the time, when shift management is not present in the control room. The Company has indisputably demonstrated the need for real-time, rapid-response decisions as a matter of ACE policy, practical reality, and federal regulations. The System Operators’ authority to carry out these essential functions is well-established in the record and largely uncontroverted. The Board should not let the Regional Director’s Decision stand in the face of this evidence and these important policy considerations.

V. **CONCLUSION**

For the foregoing reasons, the Board should grant the Request for Review and reverse the Regional Director's Decision and Direction of Election because the System Operators are supervisors under the Act.

*/s/ Jonathan C. Fritts*

---

Jonathan C. Fritts  
MORGAN, LEWIS & BOCKIUS LLP  
1111 Pennsylvania Avenue, NW  
Washington, DC 20004  
Telephone: 202.739.5867  
Facsimile 202.739.3001  
jonathan.fritts@morganlewis.com

Julia S. Sturniolo  
MORGAN, LEWIS & BOCKIUS LLP  
1701 Market Street  
Philadelphia, PA 19103  
Telephone: 215.963.4782  
Facsimile: 215.963.5001  
julia.sturniolo@morganlewis.com

Dated: July 23, 2018

*Counsel for Respondent  
Atlantic City Electric Company*

# EXHIBIT A

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
FOURTH REGION**

ATLANTIC CITY ELECTRIC COMPANY

Employer

and

Case 04-RC-221319

INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS, LOCAL 210

Petitioner

**ACTING REGIONAL DIRECTOR'S DECISION AND  
DIRECTION OF ELECTION**

The sole issue raised in this case is one upon which Regional Director Dennis P. Walsh has already ruled in a prior case involving the same employer: whether the Employer's System Operators and Senior System Operators<sup>1</sup> are supervisors under Section 2(11) of the Act. In this case, Petitioner, which represents an existing unit of the Employer's operation, production and maintenance employees,<sup>2</sup> filed a petition again seeking to include System Operators in that unit by a self-determination election, commonly referred to as an *Armour-Globe*<sup>3</sup> election. The Employer challenges the petition on the ground that the System Operators are supervisors within the meaning of 2(11) of the Act.

---

<sup>1</sup> Hereafter, any reference to System Operators shall refer to both classifications.

<sup>2</sup> The existing bargaining unit encompasses about 375 employees at the Employer's Mays Landing, New Jersey Facility working in approximately 200 job classifications in the following departments: Overhead Lines; Buried Distribution; Underground; Substation; Metered Services; Substation Operator; Service Building Attendant; Electric Systems Operations; Landscape Gardening; Radio Interference; Generation Fuel Handling; Systems Operations; Survey; Facility Services; Relay; Communications; Generation Maintenance; Generation Electrical; Generation Operating; Generation Results; Heavy Hauling; Combustion Turbine; Stores; Transportation; and Drafting & Design.

<sup>3</sup> See *Armour & Co.*, 40 NLRB 1333 (1992); *Globe Machine & Stamping Co.*, 3 NLRB 294 (1937).

In Case 04-RC-193066, a Decision and Direction of Election issued on March 17, 2017 in which the Regional Director concluded that: (1) the System Operators were not supervisors as defined in the Act; and (2) they shared a community of interest with the employees in the existing bargaining unit and constituted an appropriate voting group such that an *Armour-Globe* election was appropriate.<sup>4</sup> Because the parties have stipulated that the facts underlying their arguments concerning the System Operators' supervisory status are identical to those considered in the prior Decision, and they raise no new legal arguments herein, I find that the System Operators are not supervisors as defined in the Act, that they share a community of interest with the employees in the existing bargaining unit, and that they constitute a distinct segment of the Employer's employees which is an appropriate voting group such that an *Armour-Globe* election is appropriate.<sup>5</sup>

The parties entered into stipulations in lieu of presenting evidence in this case. In a joint stipulation of facts, the parties stipulated to the following:

- 1) The testimony and exhibits in Case 04-RC-193066 are accurate and correct as applied to the System Operators involved in the instant case, and are entered into evidence in the instant case.
- 2) The formal documents in the instant case are entered into the record in this case as Board Exhibit 1, superseding Board Exhibit 1 in Case 04-RC-193066.
- 3) The Joint Stipulation of Facts, the transcript and exhibits in Case 04-RC-193066, and the stipulated exhibits attached to the Stipulation of Facts (Board Exhibit 1 and Board Exhibit 2, including the Employer's Statement of Position, the attachment to the Statement of Position and the current list of Systems Operators) shall constitute the entire record in this matter.

Because the Regional Director has already ruled on the question of whether the System Operators are statutory supervisors and whether an *Armour-Globe* election is appropriate in Case 04-RC-193066, and in light of the parties' stipulation that all relevant facts and arguments concerning their respective positions are contained in the record in Case 04-RC-193066, I conclude, in agreement with Petitioner, that the System Operators are not statutory supervisors and that it is appropriate to proceed with an *Armour-Globe* election. In support of that conclusion, I have attached hereto a copy of the Decision and Direction of Election in Case 04-

---

<sup>4</sup> In the prior case, the Employer also argued that the System Operators' inclusion in the operation, production and maintenance employees' unit was improper because the Employer had imminent plans to relocate the control room to New Castle, Delaware. The Regional Director found that there was no evidence supporting the Employer's argument that such a move was imminent and certain. The Employer has not raised such a cessation of operations or relocation argument in this case. The Employer also has not raised a community-of-interest argument in the instant case.

<sup>5</sup> In Case 04-RC-193066, System Operators voted against union representation in an election conducted on March 27, 2017.

RC-193066, and I hereby incorporate by reference all of the findings of fact and conclusions of law in that Decision concerning these issues.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Based upon the entire record in this matter and for the reasons set forth below, I conclude and find as follows:

1. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
2. The Petitioner is a labor organization that claims to represent certain employees of the Employer.
3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
4. I find that the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time System Operators and Senior System Operators employed by the Employer at its 5100 Harding Highway, Mays Landing, New Jersey facility; **excluding** all other employees, guards, and supervisors as defined in the Act.

#### DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by International Brotherhood of Electrical Workers, Local 210 as part of the existing unit of employees in the following departments represented by International Brotherhood of Electrical Workers, Local 210:

Overhead Lines; Buried Distribution; Underground; Substation; Metered Services; Substation Operator; Service Building Attendant; Electric Systems Operations; Landscape Gardening; Radio Interference; Generation Fuel Handling; Systems Operations; Survey; Facility Services; Relay; Communications; Generation Maintenance; Generation Electrical; Generation Operating; Generation Results; Heavy Hauling; Combustion Turbine; Stores; Transportation; and Drafting & Design.

### **A. Election Details**

The election will be held on **Monday, June 25, 2018**, from 5:00 p.m. to 7:00 p.m. in "Conference Room C" on the first floor of the Employer's 5100 Harding Highway, Mays Landing, New Jersey facility.

### **B. Voting Eligibility**

Eligible to vote are those in the unit who were employed during the payroll period ending June 8, 2018, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

### **C. Voter List**

As required by Section 102.67(1) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this Decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the Regional Director and the parties by **June 19, 2018**. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at [www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015](http://www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015).



When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this Decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at [www.nlr.gov](http://www.nlr.gov). Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

#### **D. Posting of Notices of Election**

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution. Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

#### **RIGHT TO REQUEST REVIEW**

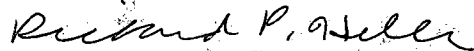
Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this Decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to [www.nlr.gov](http://www.nlr.gov), select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board,

1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated: June 15, 2018



---

**RICHARD P. HELLER**

Acting Regional Director, Region 04  
National Labor Relations Board  
615 Chestnut Street, Suite 710  
Philadelphia, PA 19106-4413



United States of America  
National Labor Relations Board  
**NOTICE OF ELECTION**



**PURPOSE OF ELECTION:** This election is to determine the representative, if any, desired by the eligible employees for purposes of collective bargaining with their employer. A majority of the valid ballots cast will determine the results of the election. Only one valid representation election may be held in a 12-month period.

**SECRET BALLOT:** The election will be by SECRET ballot under the supervision of the Regional Director of the National Labor Relations Board (NLRB). A sample of the official ballot is shown on the next page of this Notice. Voters will be allowed to vote without interference, restraint, or coercion. Electioneering will not be permitted at or near the polling place. Violations of these rules should be reported immediately to an NLRB agent. Your attention is called to Section 12 of the National Labor Relations Act which provides: ANY PERSON WHO SHALL WILLFULLY RESIST, PREVENT, IMPEDE, OR INTERFERE WITH ANY MEMBER OF THE BOARD OR ANY OF ITS AGENTS OR AGENCIES IN THE PERFORMANCE OF DUTIES PURSUANT TO THIS ACT SHALL BE PUNISHED BY A FINE OF NOT MORE THAN \$5,000 OR BY IMPRISONMENT FOR NOT MORE THAN ONE YEAR, OR BOTH.

**ELIGIBILITY RULES:** Employees eligible to vote are those described under the VOTING UNIT on the next page and include employees who did not work during the designated payroll period because they were ill or on vacation or temporarily laid off, and also include employees in the military service of the United States who appear in person at the polls. Employees who have quit or been discharged for cause since the designated payroll period and who have not been rehired or reinstated prior to the date of this election are *not* eligible to vote.

**SPECIAL ASSISTANCE:** Any employee or other participant in this election who has a handicap or needs special assistance such as a sign language interpreter to participate in this election should notify an NLRB Office as soon as possible and request the necessary assistance.

**PROCESS OF VOTING:** Upon arrival at the voting place, voters should proceed to the Board agent and identify themselves by stating their name. The Board agent will hand a ballot to each eligible voter. Voters will enter the voting booth and mark their ballot in secret. **DO NOT SIGN YOUR BALLOT.** Fold the ballot before leaving the voting booth, then personally deposit it in a ballot box under the supervision of the Board agent and leave the polling area.

**CHALLENGE OF VOTERS:** If your eligibility to vote is challenged, you will be allowed to vote a challenged ballot. Although you may believe you are eligible to vote, the polling area is not the place to resolve the issue. Give the Board agent your name and any other information you are asked to provide. After you receive a ballot, go to the voting booth, mark your ballot and fold it so as to keep the mark secret. **DO NOT SIGN YOUR BALLOT.** Return to the Board agent who will ask you to place your ballot in a challenge envelope, seal the envelope, place it in the ballot box, and leave the polling area. Your eligibility will be resolved later, if necessary.

**AUTHORIZED OBSERVERS:** Each party may designate an equal number of observers, this number to be determined by the NLRB. These observers (a) act as checkers at the voting place and at the counting of ballots; (b) assist in identifying voters; (c) challenge voters and ballots; and (d) otherwise assist the NLRB.



United States of America  
National Labor Relations Board  
**NOTICE OF ELECTION**



**VOTING UNIT 04-RC-221319**

**EMPLOYEES ELIGIBLE TO VOTE:**

Those eligible to vote are: All full-time and regular part-time System Operators and Senior System Operators employed by the Employer at its 5100 Harding Highway, Mays Landing, New Jersey facility who were employed during the payroll period ending June 8, 2018.

**EMPLOYEES NOT ELIGIBLE TO VOTE:**

Those not eligible to vote are: All other employees, guards, and supervisors as defined in the Act.

If a majority of valid ballots are cast for International Brotherhood of Electrical Workers, Local 210, they will be taken to have indicated the employees' desire to be included in the existing recognized bargaining unit of employees in the following departments currently represented by the International Brotherhood of Electrical Workers, Local 210: Overhead Lines; Buried Distribution; Underground; Substation; Metered Services; Substation Operator; Service Building Attendant; Electric Systems Operations; Landscape Gardening; Radio Interference; Generation Fuel Handling; Systems Operations; Survey; Facility Services; Relay; Communications; Generation Maintenance; Generation Electrical; Generation Operating; Generation Results; Heavy Hauling; Combustion Turbine; Stores; Transportation; and Drafting & Design. If a majority of valid ballots are not cast for representation, they will be taken to have indicated the employees' desire to remain unrepresented.

**DATE, TIME AND PLACE OF ELECTION**

Monday, June 25, 2018	5:00 PM to 7:00 PM	in "Conference Room C" on the first floor of the Employer's 5100 Harding Highway, Mays Landing, New Jersey facility.
-----------------------	--------------------	--

**EMPLOYEES ARE FREE TO VOTE AT ANY TIME THE POLLS ARE OPEN.**



United States of America  
National Labor Relations Board  
**NOTICE OF ELECTION**



	<p><b>UNITED STATES OF AMERICA</b> <b>National Labor Relations Board</b> 04-RC-221319</p> <p><b>OFFICIAL SECRET BALLOT</b></p> <p>For certain employees of <b>ATLANTIC CITY ELECTRIC COMPANY</b></p>	
<p>Do you wish to be represented for purposes of collective bargaining by <b>INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 210?</b></p>		
<p><b>MARK AN "X" IN THE SQUARE OF YOUR CHOICE</b></p>		
<p><b>YES</b></p> <div><input type="checkbox"/></div>		<p><b>NO</b></p> <div><input type="checkbox"/></div>
<p><b>DO NOT SIGN THIS BALLOT. Fold and drop in the ballot box.</b> If you spoil this ballot, return it to the Board Agent for a new one.</p> <p>The National Labor Relations Board does not endorse any choice in this election. Any markings that you may see on any sample ballot have not been put there by the National Labor Relations Board.</p>		



United States of America  
National Labor Relations Board  
**NOTICE OF ELECTION**



**RIGHTS OF EMPLOYEES - FEDERAL LAW GIVES YOU THE RIGHT TO:**

- Form, join, or assist a union
- Choose representatives to bargain with your employer on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities
- In a State where such agreements are permitted, the Union and Employer may enter into a lawful union-security agreement requiring employees to pay periodic dues and initiation fees. Nonmembers who inform the Union that they object to the use of their payments for nonrepresentational purposes may be required to pay only their share of the Union's costs of representational activities (such as collective bargaining, contract administration, and grievance adjustment).

**It is the responsibility of the National Labor Relations Board to protect employees in the exercise of these rights.**

The Board wants all eligible voters to be fully informed about their rights under Federal law and wants both Employers and Unions to know what is expected of them when it holds an election.

If agents of either Unions or Employers interfere with your right to a free, fair, and honest election the election can be set aside by the Board. When appropriate, the Board provides other remedies, such as reinstatement for employees fired for exercising their rights, including backpay from the party responsible for their discharge.

**The following are examples of conduct that interfere with the rights of employees and may result in setting aside of the election:**

- Threatening loss of jobs or benefits by an Employer or a Union
- Promising or granting promotions, pay raises, or other benefits, to influence an employee's vote by a party capable of carrying out such promises
- An Employer firing employees to discourage or encourage union activity or a Union causing them to be fired to encourage union activity
- Making campaign speeches to assembled groups of employees on company time, where attendance is mandatory, within the 24-hour period before the polls for the election first open or the mail ballots are dispatched in a mail ballot election
- Incitement by either an Employer or a Union of racial or religious prejudice by inflammatory appeals
- Threatening physical force or violence to employees by a Union or an Employer to influence their votes

**The National Labor Relations Board protects your right to a free choice.**

Improper conduct will not be permitted. All parties are expected to cooperate fully with this Agency in maintaining basic principles of a fair election as required by law.

Anyone with a question about the election may contact the NLRB Office at (215)597-7601 or visit the NLRB website [www.nlrb.gov](http://www.nlrb.gov) for assistance.

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
FOURTH REGION**

ATLANTIC CITY ELECTRIC COMPANY

Employer

and

Case 04-RC-193066

INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS, LOCAL 210

Petitioner

**REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION**

Unrepresented employees who share a community of interest with an existing bargaining unit and are an appropriate voting group may vote whether to join the bargaining unit or remain unrepresented, so long as they are not otherwise excluded from the Act's coverage by statutory definition or by Board policy. The Petitioner represents an existing unit of about 375 operation, production and maintenance employees, and now seeks a self-determination election, commonly referred to as an *Armour-Globe*<sup>1</sup> election, to ascertain whether 16 System Operators and Senior System Operators<sup>2</sup> wish to be included in that existing unit. While the Employer does not challenge the petition on community of interest grounds, it argues that the System Operators' inclusion in the unit would be improper for two other reasons: first, because the Employer plans to relocate its dispatch operation, including the System Operators who work in it, from its current location in Mays Landing, New Jersey to a central dispatch facility in New Castle, Delaware, outside the Petitioner's geographic jurisdiction; and second, because the System Operators are supervisors within the meaning of Section 2(11) of the Act. With regard to this latter contention, the Employer maintains that the Systems Operators have the authority to assign and responsibly direct the work of field employees using independent judgment, and to effectively recommend discipline, hiring, and promotion, and that they possess secondary indicia of supervisory authority.

As set forth below, I find that the evidence of the System Operators' relocation is too speculative to warrant their exclusion from the existing bargaining unit, and that they are not supervisors as defined in the Act. Because System Operators share a community of interest with the employees in the existing bargaining unit and constitute an appropriate voting group for purposes of a self-determination election, I shall order a self-determination election in the petitioned-for unit.

---

<sup>1</sup> *Armour & Co.*, 40 NLRB 1333 (1942); *Globe Machine & Stamping Co.*, 3 NLRB 294 (1937).

<sup>2</sup> Hereafter, any reference to System Operators shall refer to both classifications.

The Petitioner filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act. A Hearing Officer of the Board held a hearing, and the parties presented oral arguments at the conclusion of the hearing.

This Decision first will provide an overview of the Employer's operations and the parties' bargaining history. Then, I will set forth the legal standards to be applied in resolving the cessation of operations and supervisory issues presented by this case, including whether to direct an *Armour-Globe* election as sought by the petition. Finally, as to each of these issues, I will set forth the facts and reasoning which support my conclusions.

## **I. OVERVIEW OF OPERATIONS**

Atlantic City Electric Company (the Employer or ACE), is a public utility company that operates, maintains and controls transmission and distribution systems to provide electricity to approximately 547,000 residential, commercial, and industrial customers in southern New Jersey from its Atlantic Regional Office in Mays Landing, New Jersey. As a public utility company, the Employer is subject to extensive federal, state and interstate regulation. The Employer is owned by Pepco Holdings, Inc. (PHI) which also owns Delmarva Power & Light (Delmarva)<sup>3</sup> and Potomac Electric Power Company (Pepco). PHI was purchased by Exelon Corporation (Exelon) in 2016.

Michael Sullivan is the Vice President for Electric & Gas Operations, James Wolverton is the Director of Employee and Labor Relations, and Frank Burris is the Manager of Payroll and Human Resources Service Center for PHI. Jay Davis and Sheri Avci are the Shift Managers and Jim Settelen is the Work Management Coordinator for ACE.

## **II. BARGAINING HISTORY**

The Petitioner has represented the Employer's operating, production, and maintenance employees since 1952, and its Dispatchers and Senior Dispatchers<sup>4</sup> since 2002. It currently represents about 375 employees working in approximately 200 job classifications in the following departments:

Overhead Lines; Buried Distribution; Underground; Substation; Metered Services; Substation Operator; Service Building Attendant; Electric Systems Operations; Landscape Gardening; Radio Interference; Generation Fuel Handling; Systems Operations; Survey; Facility Services; Relay; Communications; Generation Maintenance; Generation Electrical; Generation Operating; Generation Results; Heavy Hauling; Combustion Turbine; Stores; Transportation; and Drafting & Design.

---

<sup>3</sup> Delmarva serves approximately 630,000 customers in Delaware and the Eastern Shore of Maryland.

<sup>4</sup> Hereafter, any reference to Dispatchers shall refer to both classifications.



The most recent collective bargaining agreement was effective from December 13, 2010 until October 11, 2015 (CBA), but was extended until October 15, 2018 pursuant to a June 9, 2014 memorandum of understanding.

The System Operators at Mays Landing have never been represented by any labor organization. The System Operators at PHI's other union-represented utility companies<sup>5</sup> are also not currently included in the operation, production and maintenance bargaining units at those companies, although for many years the Systems Operators at Delmarva were included in such a unit. Those employees, then represented by IBEW Local 1238, were removed by agreement in 2011.

### **III. THE RELEVANT LEGAL STANDARDS**

#### ***A. Armour-Globe Elections***

An *Armour-Globe* election permits employees sharing a community of interest with an already represented unit of employees to vote on whether they wish to be added to the existing unit. *NLRB v. Raytheon Co.*, 918 F.2d 249, 251 (1st Cir. 1990); *Armour & Co.*, *supra*; *Globe Machine & Stamping Co.*, *supra*. The Board has held that a self-determination election is the proper method by which an incumbent union may add unrepresented employees to its existing unit if the employees sought to be included share a community of interest with unit employees and "constitute an identifiable, distinct segment so as to constitute an appropriate voting group." *Warner-Lambert Co.*, 298 NLRB 993, 995 (1990).

#### ***B. The Cessation of Operations/Relocation Issue***

The Act directs the Board, upon the filing of a representation petition, to investigate whether a question of representation exists by holding an appropriate hearing, and if it does exist, to direct an election and certify the results thereof. 29 U.S.C. Section 159 (c)(1). The Board has recognized a narrow exception to this statutory mandate, limited to circumstances in which it is reasonably certain that conducting an election will serve no purpose. It will dismiss an election petition when cessation of the employer's operations is imminent, such as when an employer completely ceases to operate, sells its operations, or fundamentally changes the nature of its business. See, e.g., *MJM Studios*, 336 NLRB 1255 (2001); *Hughes Aircraft Co.*, 308 NLRB 82 (1992); *Martin Marietta Aluminum*, 214 NLRB 646, 646-647 (1974); and *Cooper International*, 205 NLRB 1057, 1057 (1973).

The party asserting a cessation of operations bears the burden of proving that cessation of operations is both imminent and certain. *Hughes Aircraft Co.*, *supra* at 83; *Larson Plywood Co.*, 223 NLRB 1161 (1976); and *Martin Marietta Aluminum*, *supra* at 647. The Board requires concrete evidence such as announcements of business closure to the public and the employees, termination of employees, or other evidence that the Employer has definitively determined the sale, cessation, or fundamental change in the nature of its operations. *Hughes Aircraft Co.*, *supra* at 83; *Martin Marietta Aluminum*, *supra* at 646-647. Factors considered include the period of time between the representation hearing and the expected date of cessation, steps taken by the

---

<sup>5</sup> These include Baltimore Gas & Electric, Philadelphia Electric, Pepco, and Delmarva.

employer to effectuate the change, and whether the employees have been notified. *Hughes Aircraft*, *supra* at 82-83; *Davey McKee Corp*, 308 NLRB 839, 840 (1992); *Larson Plywood Co.*, *supra*; *MJM Studios of New York, Inc.*, *supra*.

The Board will not dismiss an election petition based upon conjecture or uncertainty concerning an Employer's future operations, an employer's contention that it intends to cease operations or reduce its workload sometime in the future, or evidence of cessation that is conditional or tentative. Such speculative assertions concerning the uncertainty of future operations are not sufficient to warrant dismissing the petition and withholding from employees their statutory right to choose or reject union representation. *Canterbury of Puerto Rico, Inc.*, 225 NLRB 309 (1976); *Hazard Express, Inc.*, 324 NLRB 989, 990 (1997); *Gibson Electric*, 226 NLRB 1063 (1976); *Retro Environmental, Inc./Green Jobworks, LLC*, 364 NLRB No. 70, slip op. at 4 (August 16, 2016).

For example, the Board has held that where an employer's operations are scheduled to terminate within three to four months, no useful purpose is served by directing an election. *Davey McKee Corp.*, *supra* at 840. In *Hughes Aircraft Co.*, *supra*, the subcontracting and elimination of unit work within 90 days was found to be definite and imminent based upon evidence of the employer's solicitation of bids, meetings with and execution of agreements with subcontractors, and notification to employees of the timeframe of their anticipated layoff. In *Martin Marietta Aluminum*, *supra*, evidence that the employer sought a purchaser for its plant, announced closure of the plant to employees and the media, discharged employees, stopped taking orders, and terminated existing contracts supported a finding that plant closure was definite and imminent. In *Larson Plywood Co.*, *supra*, the record established that the employer intended to liquidate its entire business within 90 days. In *Douglas Motors Corp.*, 128 NLRB 307 (1960), the evidence showed that the employer intended to subcontract all of its operations within six months.

### C. Factors Relevant to Evaluating Supervisory Status Generally

Supervisors are specifically excluded from coverage under the National Labor Relations Act. The burden of establishing supervisory status is on the party asserting that such status exists. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711-713 (2001); *Shaw Inc.*, 350 NLRB 354, 355 (2007); *Croft Metals, Inc.*, 348 NLRB 717, 721 (2006). The party seeking to prove supervisory status must establish it by a preponderance of the evidence. *Croft Metals, Inc.*, *supra*; *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006). Section 2(11) of the Act sets forth a three-part test for determining whether an individual is a supervisor. Pursuant to this test, employees are statutory supervisors if: (1) they hold the authority to engage in any one of the 12 listed supervisory functions;<sup>6</sup> (2) their exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment; and (3) their authority is held in the interest of the employer. *NLRB v. Kentucky River*, *supra* at 712-713; *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 573-574 (1994).

---

<sup>6</sup> These include the authority to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action. 29 U.S.C. Section 152(11).

The statutory criteria for supervisory status set forth in Section 2(11) are read in the disjunctive, and possession of any one of the indicia listed is sufficient to make an individual a supervisor. *NLRB v. Kentucky River*, *supra* at 713; *Shaw, Inc.*, *supra* at 355. The Board analyzes each case in order to differentiate between the exercise of independent judgment and the giving of routine instructions; between effective recommendation and forceful suggestions; and between the appearance of supervision and supervision in fact. The exercise of some supervisory authority in a merely routine, clerical, or perfunctory manner does not confer supervisory status on an employee. *Oakwood Healthcare, Inc.*, *supra* at 693; *J.C. Brock Corp.*, 314 NLRB 157, 158 (1994). The authority effectively to recommend an action means that the recommended action is taken without independent investigation by supervisors, not simply that the recommendation is ultimately followed. *The Republican Co.*, 361 NLRB No. 15, slip op. at 5 (2014); *Children's Farm Home*, 324 NLRB 61 (1997). The Board has made clear that the proponent's evidentiary burden is significant and substantial, holding that purely conclusory evidence is not sufficient to establish supervisory status. *Golden Crest Healthcare Center*, 348 NLRB 727, 729 (2006); *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006); *Chevron Shipping Co.*, 317 NLRB 379, 381 fn. 6 (1995).

The Board has an obligation not to construe the statutory language too broadly because the individual found to be a supervisor is denied the employee rights that are protected under the Act. *Avante at Wilson*, *supra* at 1057; *Oakwood Healthcare*, *supra* at 687. Where the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, the Board will find that supervisory status has not been established, at least on the basis of those indicia. *The Republican Co.*, *supra*; *Dole Fresh Vegetables, Inc.*, 339 NLRB 785, 792 (2003). In order to meet the burden of proof, a party must show specific details and/or circumstances making clear that the claimed supervisory authority actually exists, and is not mere paper authority. *Avante at Wilson*, *supra* at 1057-1058. The sporadic exercise of supervisory authority is not sufficient to transform an employee into a supervisor. *Shaw, Inc.*, *supra* at 357, fn. 21; *Oakwood Healthcare*, *supra* at 693; *Kanahwa Stone Co.*, 334 NLRB 235, 237 (2001).

In its decisions in *Oakwood Healthcare*, *supra*, *Croft Metals*, *supra*, and *Golden Crest Healthcare Center*, *supra*, the Board clarified the circumstances in which it will find that individuals exercise sufficient discretion in performing two of the functions listed in Section 2(11) – assignment and responsible direction of work – to justify their classification as statutory supervisors. As defined in *Oakwood Healthcare*, *supra* at 689-690, the term “assign” refers to the “act of designating an employee to a place (such as a location, department or wing), appointing an employee to a time (such as a shift or overtime period) or giving significant overall duties, i.e., tasks, to an employee.” Choosing the order in which an employee will perform discrete tasks within an overall significant assignment of duties will not be considered indicative of exercising the authority to “assign.” *Id.*

In *Oakwood Healthcare*, the Board explained “responsible direction,” as follows: “If a person on the shop floor has ‘men under him,’ and if that person decides ‘what job shall be undertaken next or who shall do it,’ that person is a supervisor, provided that the direction is both ‘responsible’ and carried out with independent judgment.” “Responsible direction,” in contrast to “assignment,” can involve the delegation of discrete tasks as opposed to overall duties. *Oakwood Healthcare*, *supra* at 690-692. But, an individual will be found to have the

authority to responsibly direct other employees only if the individual is *accountable* for the performance of the tasks by the other employee. Accountability means that the employer has delegated to the putative supervisor the authority to direct the work and the authority to take corrective action if necessary, and the putative supervisor faces the prospect of adverse consequences if the employees under his or her command fail to perform their tasks correctly. *Ibid.* See also *Community Education Centers*, 360 NLRB No. 17, slip op. at 1 (2014).

Assignment or responsible direction will produce a finding of supervisory status only if the exercise of independent judgment is also involved. The Board has specifically defined the term independent judgment as requiring that in individual act or effectively recommend action free from the control of others and form an opinion or evaluation by discerning and comparing data, provided that the act is not of a routine or clerical nature. The Board made clear that judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules or a collective-bargaining agreement, or the verbal instruction of higher authority. *Id.* at 692-93; *PPG Aerospace Industries, Inc.*, 353 NLRB 223, 223 (2008). Further, the Board's interpretation of the term "independent judgment" applies regardless of the supervisory function implicated and without regard for whether the judgment is exercised using professional or technical expertise. *Oakwood Healthcare, supra* at 692.

#### D. Analysis of Supervisory Authority in the Electric Utility Industry

The law concerning the supervisory status of electric utility dispatchers has long been in flux. For decades, the Board regularly held that employees who monitored the transmission and distribution of electric power, designed some or most of the switching sequences, and directed field employees in carrying out the switching orders were not statutory supervisors and could unionize. Then, in *Big Rivers Electric Corp.*, 266 NLRB 380, 383 n. 2 (1983), the Board overruled those decisions, concluding that such employees responsibly directed other employees and that their assignment of employees to carry out switching directives involved the use of independent judgment. *Big Rivers Electric Corp., supra* at 382.

In *Mississippi Power & Light Co.*, 328 NLRB 965 (1999), the Board returned to its decades-long position when it reversed *Big Rivers*, finding that the Board there failed to give appropriate weight to the "quasiprofessional, quasi-overseer" nature of electric utility dispatchers and placed too great an emphasis on the inherent complexity of the dispatchers' duties and on the potential adverse consequences to the well-being and safety of the public and employees that might result from the dispatchers' misjudgments. *Mississippi Power, supra* at 969-970. Applying the rationale of the charge nurse supervisory cases, the Board concluded that the exercise of critical judgment by dispatchers based on their experience, expertise, know-how, or formal training and education did not amount to the exercise of supervisory judgment.

In *Oakwood Healthcare, supra* at 686, the Board clarified the meaning of the terms "assign," "responsibly to direct," and "independent judgment" under Section 2(11) of the Act.<sup>7</sup> Thus, the Board's ruling in *Oakwood Healthcare* further defined its interpretation of supervisory

---

<sup>7</sup> See also *Croft Metals, Inc.*, 348 NLRB 717 (2006); *Golden Crest Healthcare Center*, 348 NLRB 727 (2006).

judgment previously set forth in *Mississippi Power* to include those judgments exercised as a result of professional expertise, so long as it was exercised in relation to one of the 12 indicia of supervisory authority.

The Board first applied *Oakwood Healthcare* to the utility industry when it revisited the supervisory status of electrical dispatchers in *Entergy Mississippi, Inc.*, 357 NLRB 2150 (2011). There, the Board held that a group of 25 dispatchers were not statutory supervisors because they did not assign work or responsibly direct employees. The Board reasoned that although the dispatchers had the authority to direct field employees in the step-by-step instructions of a switching order, and were held accountable for their own failures and errors, they were not accountable for the actions of the field employees they directed. As set forth in *Oakwood Healthcare*, such direction was only responsible if the dispatcher was held accountable for the performance of the field employee. *Oakwood Healthcare*, *supra* at 692. Further, the Board found that the dispatchers did not have supervisory authority to assign field employees under the *Oakwood Healthcare* standard because the assignment of those employees to trouble locations did not entail the exercise of independent judgment. As to the requirement that they direct the employees to a location or “place,” the Board noted that the location of the outage dictated where the employee would be assigned, and the field employees assigned to that particular area would handle the outage. With respect to whether they directed employees at a particular “time,” the Board found that although the dispatchers had the authority to assign overtime to field employees during outages, they could not *require* the employees to work the outage overtime assigned to them. *Golden Crest Healthcare*, *supra* at 729.

More recently, in *NLRB v. NSTAR Electric Company*, 798 F.3d 1 (1<sup>st</sup> Cir. 2015), the Court of Appeals, reviewing an order of the Board denying a request for review of an acting regional director’s decision and direction of election, found there was substantial evidence to support the conclusion that 13 transmission systems supervisors and three senior transmission outage coordinators<sup>8</sup> were not statutory supervisors. Applying *Oakwood Healthcare*, *supra*, the court agreed that although these classifications of employees occasionally reassigned field employees to alternate locations during planned outage work and to trouble locations during unplanned outages, such assignments did not require independent judgment as they were controlled by detailed instructions and established call-out procedures. *Id.* at 13-14. Additionally, the court agreed that the transmission systems supervisors and senior transmission outage coordinators did not assign work within the meaning of Section 2(11) based on their dispatching of field employees to work that might require overtime because although they might authorize overtime work for field employees after discussion with the employees’ supervisors, the field supervisors possessed the full authority to assign and approve overtime for the field employees. *Id.* at 15.

#### IV. FACTS

##### A. Cessation of Operations/Proposed Relocation Issue

---

<sup>8</sup> The Employer’s System Operators herein were formerly known as Transmission System Dispatchers.

System Operators work in the Employer's central dispatch operation, also called the control room, which has overall responsibility for the management of the electric system. It is staffed with 11 Senior System Operators, five System Operators, a Work Management Coordinator, 13 Senior Dispatchers, two Dispatchers, and two Shift Managers. Shift Manager Jay Davis is responsible for supervising the System Operators and Shift Manager Sheri Avci supervises the Dispatchers.

PHI also has a control room in New Castle, Delaware, that currently houses System Operators and Dispatchers employed in the Delmarva operation, but may, in the future, serve as the worksite for the Mays Landing control room personnel, including the System Operators. PHI began making plans for the relocation in 2011. According to the Employer, the New Castle dispatch operation is located in a facility with greater computer and building security than the Mays Landing operation, and it will save \$10-15 million by combining its dispatch operations while also improving performance by having more personnel to assist with power restoration after storms.

The Employer first raised the possibility of the control room consolidation to IBEW Local 1238, the bargaining representative of the Delmarva employees, in February 2011. Two years later, it shared written plans of the proposed consolidation with the Petitioner. It appears that the Employer and Petitioner did not discuss the issue again until around January 2014, when they initiated effects bargaining over the proposed move of the Mays Landing control room. Among the topics discussed were the relocation of some employees and the reassignment of others to new positions at Mays Landing, and related issues such as severance pay. The parties met and traded proposals in March, April and August 2014. Ultimately, however, bargaining stalled because the Employer decided to seek approval to relocate the control room from the State of New Jersey's Board of Public Utilities (BPU), and the Petitioner declined to engage in further effects bargaining until the Employer obtained approval.

On June 9, 2014, in anticipation of the expiration of the CBA on October 11, 2015, and the expected merger between Exelon and PHI, the Employer and the Petitioner negotiated a contract extension agreement providing, among other things, that in the event the control room were relocated to New Castle, the Employer would hire seven new bargaining unit employees at the Mays Landing operation to compensate for the loss of bargaining unit members caused by the relocation.

Although the Employer was not legally required to seek the BPU's approval before moving forward with its consolidation, at the BPU's request it filed a petition with the BPU in March or April 2015 seeking its permission to consolidate the Mays Landing and New Castle control rooms. The petition described how the consolidation would improve the Employer's economics and reliability. A hearing date was initially set for June 2016, but before it could take place, the BPU requested in June 2015 that the Employer withdraw its petition because BPU's resources were limited at that time due to: (1) its consideration of the PHI-Exelon merger; (2) the Employer's pending base rate case, filed in early 2016, to increase electricity rates; and (3) the Employer's regulatory filing concerning grid resiliency called the Power Ahead Program. Although the PHI-Exelon merger was subsequently completed in early 2016 and the base rate case concluded in late 2016, as of the date of hearing in the instant case, the Employer had not resubmitted its petition for approval of the consolidation plans. The Employer's Power Ahead Program request remains pending at the BPU.

Mays Landing System Operators began hearing about the possibility of their transfer to New Castle from Delmarva employees in late 2013 or early 2014. The Employer asserts that since 2014, it has made clear to all newly hired employees in the Mays Landing control room that it will eventually be moving that operation to New Castle. While there is no evidence that it made similar announcements to its existing employees, it did have some discussions about the possibility of a move with its employees during safety action committee meetings, and Shift Manager Davis also provided updates to employees. It appears, however that all of these discussions were initiated by employees. The Employer admittedly has not given its employees or the Petitioner written or formal notice of a final decision concerning the relocation nor advised them of an expected date or timeframe.

The Employer stated that it believes it will refile its petition with the BPU in about four to six weeks, and that it knows of no reason why the BPU would not issue a decision until a couple months thereafter. The Employer anticipates the BPU will approve its request, but concedes that is not a certainty. It does not know if it will relocate its control room if its petition is denied by the BPU.

If the consolidation of the control rooms is approved by the BPU, the Employer expects that the process of transferring the Mays Landing control room will probably take a year, but noted that its employees who live close to the New Castle facility could start working there immediately. The Employer intends to move its operations in the following order: transmission evening operations; transmission day operations; distribution night shift operations; day shift operations; and dispatch.

## B. Supervisory Issue

### 1. System Operators' Work Responsibilities

System Operators work out of the Employer's control room with Dispatchers and Shift Supervisors. Shift Supervisors determine the numbers of Dispatchers and System Operators assigned to a particular shift, which vary by season but are otherwise consistent. Ordinarily, there are four or five System Operators and three Dispatchers assigned to each shift. There are about 300 front line men (also referred to as field employees), consisting of troublemen, meter readers, and crews, working daily.

Using a computer system called an "energy management system," System Operators remotely control the transmission system to permit construction, maintenance, or power restoration as quickly as possible. They open and close circuit breakers, control transformers, reactors, and capacitors, and switch devices in and out, isolating parts of the system so that repair or maintenance work can be done safely and efficiently. Some of this work is planned, but in emergency situations, System Operators must act quickly to protect the security of the system, balancing the provision of power to customers against the risk of collapse of the system. Frequently, this involves "switching" to address shortages in supply or increases in demand. They prioritize resources not only during adverse weather conditions when restoration work is performed but also on normal "blue sky" days.

System Operators are responsible for directing the operation of the Employer's distribution system 24 hours a day, seven days a week. They monitor, evaluate, control, and

prioritize resources for work on 69 to 500 kilovolts and above in order to ensure the safety, reliability and cost efficiency of the system. They also build and maintain new residential and commercial services. System Operators regularly coordinate with the Pennsylvania—New Jersey—Maryland Interconnection Corporation (PJM)<sup>9</sup> and local customers to balance the needs of the overall transmission system on the East Coast with the needs of the Employer. For example, PJM may request that a circuit be brought in or not be taken out for maintenance and the System Operator then must decide whether to take it out for maintenance or save that work for a subsequent day. The Work Management Coordinator, a position a grade above System Operators, is responsible for coordinating outages with PJM, and determining the type and order of work to be performed.

In performing the above duties, System Operators follow guidelines and instructions written by the Director of Systems Management for addressing outages and other issues that routinely arise. The guidelines, found in about 150 different documents, set forth operational procedures for a wide range of activities, from checking into a substation, panel drilling, and breaker operations to dealing with bomb threats and cyber security issues. They establish a list of priorities that System Operators should follow, and while System Operators usually adhere to the guidelines' framework when assigning priorities, they may deviate from the guidelines if necessary, often a weekly occurrence. Less senior System Operators are expected to notify their Shift Manager if they deviate from the guidelines, although they are not required to do so.

In making such decisions, System Operators consider the time of day, type of customer, loading, and resources available. Safety and security issues, such as downed wires or outages at critical care facilities, are given top priority. They also work to restore power to the largest number of customers utilizing the fewest resources. System Operators determine what kind of equipment for construction or maintenance can be taken out, when and for how long. They decide whether to disconnect large numbers of customers to protect the integrity of the system, and whether to switch loads or perform repairs. They also determine how resources are allocated, which can impact how long field employees are at a particular jobsite, and the number and type of crews dispatched.

System Operators make operating system decisions that protect the integrity of the electric system, like taking out a circuit, dropping customers, or reconnecting customers to other circuits to avoid overloads. At times, they can close a switch remotely from their terminal; other times, they dispatch a crew to the site to operate the switch. They write switching instructions for field employees so they can isolate, de-energize, tag, and ground stations so field crews can safely work on them. They also clear areas so construction, testing, or equipment installation can occur safely.

System Operators work side by side with Dispatchers in the control room, and they perform similar work. The key difference between them is the scope of their work. Dispatchers are responsible for individual service work, trouble work, and meter work involving small groups of customers or individual customers, and they dispatch resources to those areas. Typically, customers call in to report service issues, and the Employer's computer system triangulates the calls and automatically dispatches troubleshooters to the likely source. The

---

<sup>9</sup> PJM is a regional transmission organization that coordinates the movement of electricity in 13 states in the Mid-Atlantic area to enhance the reliability, security, and safety of the system.



Dispatcher then monitors and prioritizes the trouble orders and work. System Operators, on the other hand, have broader responsibility for geographic areas. The System Operators operate substations<sup>10</sup> and equipment in the field, monitor the system, and make priority decisions about where to place resources, which might entail dispatching field employees from a small outage to a large outage.

As to the differences between Senior System Operators and System Operators, the former generally have more experience working for the Employer, and work on transmission systems such as high voltage lines, large substations, and power plants. System Operators work on distribution systems for small customers of 69 kilovolts and less. Senior System Operators can work on distribution systems, but System Operators cannot work on transmission systems.

## 2. Assignment of Work

System Operators do not assign field employees to particular jobs. Rather, they determine the need for the work, and then they or the Dispatcher request the Field Supervisor to dispatch a crew to perform the work. Although System Operators and Field Supervisors may discuss how to best utilize the field employees based upon their skill sets and qualifications, Field Supervisors assign the field employees to particular jobs.

About every three to four weeks, System Operators cancel previously scheduled work due to weather, customer usage issues, or a reliability issue on the system. Field Supervisors can also change work plans for the day without approval from System Operators. Field employees may cancel their own jobs due to a lack of personnel or equipment, but they will usually inform the System Operator that they have done so. System Operators can deny requests for work, such as in circumstances when there was insufficient time to obtain a permit, a prerequisite for de-energized work. Field Supervisors determine whether permits are needed.

System Operators regularly communicate with Field Supervisors regarding the need for both planned and emergency overtime. While the System Operator determines and advises the Field Supervisor of the need for a crew, it is the Field Supervisor who selects the employees to whom overtime will be assigned. If a System Operator orders a field crew to a site but a Dispatcher cannot accommodate the request, a System Operator can call a Field Supervisor directly and request that a crew be dispatched. However, Field Supervisors can refuse such requests. If there is a disagreement as to whether a field crew should be assigned, System Operators have the authority to direct Field Supervisors to assign crews, but the record is unclear as to how often or in what circumstances this has occurred.

Emergency work is performed by troublemen, who are assigned by district and are familiar with their assigned geographic areas. On normal "blue sky" days, troublemen retrieve their orders and go to work. This "planned work" is assigned by the Work Management Coordinator in the field. In storm conditions, System Operators can reallocate field employees from planned work to trouble work, but it is the Field Supervisors who assign the employees to the particular jobs.

---

<sup>10</sup> For work on substations, Substation Supervisors schedule the work.

In the field, Crew Leaders, who are in the bargaining unit, direct how the work is performed, and are responsible for ensuring that it is performed properly. The sequencing of work, including carrying out the switching instructions, is the domain of the Crew Leader. If field employees are unable to complete a job, they notify their Field Supervisor but may also call the System Operator to transfer their clearance to a different crew if they are leaving the job for the day. System Operators cannot require field employees to stay to finish work.

### 3. Responsible Direction

System Operators perform field audits twice a year: they go to substations to ensure that tags and battery levels are correct, and inspect switching and tagging instructions to verify that field employees' work on permits is accurate. There is no evidence that such audits result in discipline to field employees or Dispatchers, nor is there evidence that System Operators are held accountable for errors made in the field.

System Operators are evaluated on their performance in terms of reliability, safety, and cost efficiency. The Employer uses a Performance Accountability System which has an annual performance goal of fewer than 25 permit and tagging incidents/errors company-wide for field employees and zero errors for System Operators. Dispatchers are held to the same standard as System Operators and are evaluated using the same Performance Accountability Form. While System Operators are not considered responsible for field employee errors, they are held accountable for their own conduct in failing to communicate properly with the field employees. For example, the Employer provided evidence of one instance in which a field crew "timed out" and the System Operator did not bring in another crew, impacting a nuclear reactor which was undergoing a diesel emergency generator test. The System Operator received a "verbal censure," and System Operators were advised to include special instructions in their clearance orders in the future.

### 4. Other Supervisory Indicia

There is no evidence that System Operators have the authority to hire or effectively recommend the hire of other employees. Over the last five years, one Senior System Operator, Paul Ridgway, has participated in six Hiring Interview Panels for System Operators and Dispatchers along with Shift Managers and the Work Management Coordinator. However, he did not make any hiring recommendations or decisions. Rather, all of the participants in the Hiring Interview Panel reached a consensus about each of the candidates after asking them the same questions during the interviews. Ridgway's participation in these interviews was also voluntary and not required as part of his regular duties. Indeed, the Employer asked System Operator Jim Szypula to serve on a panel approximately 3-4 years ago but he declined with no repercussions.

There is similarly no evidence that System Operators have the authority to discipline employees, or to effectively recommend such discipline. Although Vice President for Electric & Gas Operations Michael Sullivan testified that System Operators have the authority to recommend discipline, promotion, layoff and the granting of time off, he failed to provide concrete examples of such recommendations and his testimony was contrary to that of Senior System Operator Jim Luciani. System Operators may have occasion to report violations of lock out tags to the Field Supervisor or Shift Manager, but any resulting discipline to field employees

is determined by the Field Supervisor and System Operators have no involvement in such decisions. Similarly, System Operators may provide feedback to Field Supervisors or Shift Managers concerning field employee performance issues such as customers being left out of service or overtime not being worked, but they are not involved in any discussions over whether such conduct warrants discipline, nor is there evidence that any of these reports has resulted in discipline. System Operators also cannot discipline Field Supervisors for refusing their requests to assign field crews to jobs. System Operators are obligated to report dangerous conditions caused by field employees, but that reporting obligation extends to all of the Employer's employees.

There is also no evidence that System Operators have the authority to promote or lay off employees, grant them time off or authorize overtime. They do not evaluate employees or adjust their grievances.

#### 5. Secondary Indicia of Supervisory Status

System Operators are salaried employees, earning between \$88,000 and \$120,000 annually. They earn performance-based bonuses based on the criteria of safety, reliability, and efficiency. They are also able to participate in the Employer's stock purchase program. For purposes of comparison, the operating, production and maintenance bargaining unit employees are compensated on an hourly basis, and their 2017 wage rates range from approximately \$29 to \$53 per hour.<sup>11</sup> This amounts to annual earnings of \$60,320-\$110,240 based on a 40-hour work week. Dispatchers earn between \$37 and \$44 per hour depending on their department and tenure, which amounts to \$76,960-\$91,520 annually based upon a 40-hour week. These figures exclude any overtime since the record is silent both as to how much overtime is worked, and whether Dispatchers work overtime.

### V. ANALYSIS

#### A. Cessation of Operations/Relocation of the System Operators

While the Board will decline to conduct an election based on an employer's intention to cease operations or make changes to the nature of its business, it will do so only if the employer has shown that such changes are both imminent and certain. The Employer's plan to relocate its Mays Landing control room to New Castle is neither imminent nor certain, and is far too speculative at this time to deny the System Operators the opportunity to participate in a representation election.

There is no dispute that the Employer has been considering the consolidation of the Mays Landing and New Castle control rooms since at least 2011. Yet, six years later, it has made no concrete plans and is still unable to provide a firm estimate of when such a move will occur. Instead, the Employer has voluntarily acceded to a condition precedent to the relocation – BPU approval of the plan – completely beyond the Employer's control. It is unclear whether the BPU will grant such approval to the Employer, or when it will do so. In fact, the Employer has not yet

---

<sup>11</sup> These rates were calculated using the wage rates set forth in Exhibit A to the 2010 collective bargaining agreement and increasing them by three percent per year in the years 2015, 2016 and 2017 as per the parties' contract extension.

even filed its petition with the BPU, and is admittedly at least four to six weeks away from doing so, despite the fact that the last stated barrier to filing such a petition, the base rate case, has been completed for at least three months. Further, while the BPU may be familiar with the facts in support of the Employer's request from its prior petition, this does not guarantee that the petition will be granted or that it will occur in the timeframe contemplated by the Employer. It is also possible that the BPU will deny the Employer's request, that a decision will be delayed, or that the BPU will again request that the Employer defer its request until it concludes its work on the Power Ahead Program or for some other reason. The Employer's argument turns on the kind of conjecture and uncertainty that the Board has repeatedly rejected as insufficient to warrant dismissal of a petition.

Further, although the Employer has informally discussed the potential relocation with employees since 2014 at the employees' prompting, it is undisputed that the Employer has not made a formal announcement to its employees or to Petitioner concerning a final decision to relocate the Mays Landing control room at a certain time or even that its plan to move is definite. While the Employer may have made preliminary plans on how to effectuate the move and negotiated with the Petitioner about some aspects of the proposed relocation, these tentative preparations do not show that the relocation is imminent or certain. Lastly, the Employer argues that irrespective of whether the *Hughes Aircraft* standard is met, I can and should make a "policy choice" and find that it does not effectuate the purposes of the Act to hold an election. This is not countenanced by extant Board law, which I am bound to follow, and I decline to do so.

In light of the above, the Employer has failed to meet its burden to establish that the relocation of its control room from Mays Landing to New Castle is imminent and certain. The evidence overwhelmingly supports that any such move is too speculative to warrant withholding from System Operators their statutory right to choose or reject union representation. *Canterbury of Puerto Rico, supra, Hazard Express, supra.*

#### B. The Supervisory Status of the System Operators

As the party asserting supervisory status, the Employer has the burden to produce sufficient evidence to show that System Operators exercise at least one of the supervisory indicia set forth in Section 2(11) of the Act, and that they do so utilizing independent judgment. The Employer contends that the System Operators assign work to employees and responsibly direct them, but the record evidence does not support these contentions.

System Operators are charged with the difficult task of directing the operation of the Employer's distribution system and protecting its integrity, taking into account concerns for both individual and societal safety and security while constantly balancing needs and risks. They perform their duties by monitoring and prioritizing resources in conjunction with PJM and other regulatory authorities. To assist them, they employ a computerized energy management system and over 150 written guidelines detailing how to address issues which may occur. While the vast majority of their myriad decisions fall within those guidelines, they must occasionally deviate from them and use their professional judgment. But, as the Board stated in *Mississippi Power*, this judgment, which may be based upon their experience, expertise, training, or education, is not

supervisory judgment unless it is exercised in relation to one of the 12 indicia of supervisory authority. *Oakwood Healthcare*, *supra*, *Mississippi Power*, *supra*, *Providence Hospital*, *supra*.

### 1. Assignment of Work

As described above in *Oakwood Healthcare*, *supra* at 689, the Board stated that the term "assign" refers to "the act of designating an employee to a place (such as a location, department or wing), appointing an employee to a time (such as a shift or overtime period) or giving significant overall duties, i.e., tasks, to an employee." Accordingly, designating an employee to a particular shift or assigning certain significant tasks would qualify as assignment. Merely choosing the order in which to perform tasks does not constitute assignment. *Id.* Supervisory authority is also not established where the asserted supervisor merely has the authority to request that the action be taken. *Golden Crest Healthcare Center*, *supra* at 729. Even if an asserted supervisor purportedly has the authority to require action, if the consequences to the employee of refusing to take such action are *de minimis*, the claimed authority does not reflect a genuine authority to require the requested action. *Id.*

System Operators do not schedule the shifts or hours of the field employees, nor do they select which employees will be assigned to a particular task or direct them to a specific location. While System Operators may determine, based upon their assessment of conditions on the system, that it is necessary to dispatch a field crew or troublemen to a location for repairs, and may even have input into how best to utilize field employees based upon their relative expertise, it is the Field Supervisor who assigns employees to those tasks, and the System Operators do not have the authority to do so. These assignments are also temporary and may change on a daily basis.

As noted in *Entergy Mississippi*, *supra*, when electric utility field employees are dispatched to address an outage or other service issue, the location of the problem dictates where the employees are assigned, and the field employees assigned to that particular geographic area typically handle that assignment. Assignment of work based on geographic proximity is commonsense efficiency, and assignment of work on this basis is routine and insufficient to establish supervisory status. *St. Vincent Hospital, LLC*, 344 NLRB 586, 595 (2005), citing *Carlisle Engineered Products, Inc.*, 330 NLRB 1359 (2000) See also *NLRB v. NSTAR Elec. Co.*, *supra* at 13-14 (the reassignment of field employees by transmission systems supervisors and senior transmission outage coordinators to alternate locations during planned outage work and to trouble locations during unplanned outages was insufficient to constitute assignment within the meaning of Section 2(11) because those assignments did not require independent judgment, as they were controlled by detailed instructions and established call-out procedures, and typically were geographically driven).

Additionally, although System Operators may conclude that overtime work is necessary, or that certain jobs should be cancelled, they are not involved in determining which crews or employees are assigned to the overtime, or how to reassign or re-dispatch employees to other jobs. As the Board stated in *Entergy Mississippi*, *supra*, the authority to allocate overtime to field employees during outages, without more, does not equate to the assignment of work as it is not a requirement that particular employees work the overtime assigned to them.

Thus, while it is clear that System Operators' assessments and decisions may ultimately have an impact on field employees in terms of the need for overtime, type of crew, equipment used, length of a particular job, or switching instructions used, none of this amounts to assignment of work using independent judgment. See *NLRB v. NSTAR Electric Co.*, *supra* at 15 (substantial evidence supported acting regional director's conclusion that transmission systems supervisors and senior transmission outage coordinators did not assign within the meaning of Section 2(11), where they did not assign field employees to regular shifts or reporting times, and although they might authorize overtime work for field employees after consulting with those employees' supervisors, the field supervisors possessed the full authority to assign and approve overtime for the field employees). There is insufficient evidence to establish that System Operators assign work within the meaning of Section 2(11) of the Act.

## 2. Responsible Direction

"Direction" encompasses both monitoring employee performance to make certain that tasks are performed correctly, and making discrete assignments of specific jobs. *Golden Crest Healthcare Center*, *supra* at 730. Making discrete assignments has been defined as deciding what job will be performed next or who shall do it, provided that such direction is both responsible and carried out with independent judgment. *Oakwood Healthcare*, *supra* at 694. The evidence must establish that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. Here, then, the Employer must show that the System Operators exercise independent judgment in deciding whether field employees' performance meets appropriate standards; that they can take corrective action in response to deficient performance; and that they are held accountable for employees' performance and can suffer adverse consequences if those employees perform poorly. *Community Education Centers*, *supra*, 360 NLRB No. 17, slip op. at 1 (2014). The Employer has not made that showing.

Although System Operators perform field audits twice a year, there is no evidence that they are evaluating whether a specific employee or crew's performance met the Employer's standards, or that they have the authority to take any corrective action if they find deficient performance. Rather, it is the Field Supervisors and Crew Leaders alone who direct how the work is performed in the field. There is similarly no evidence that the System Operators are held accountable for the field employees' performance or that they suffer adverse consequences if the field employees perform poorly. Field employees have a performance standard of fewer than 25 errors that does not apply to System Operators, and there is no evidence that System Operators are held accountable for those errors. The Employer's evidence of a single example of such purported adverse consequences, in which a System Operator failed to communicate with the field crew with respect to the nuclear reactor test, in fact illustrates that System Operators are evaluated strictly on their own performance and thus undermines the Employer's argument. I therefore find that the Employer has failed to establish that System Operators responsibly direct the job performance of any employees. *Oakwood Healthcare*, *supra* at 695; *Golden Crest Healthcare Center*, *supra* at 731-732.

### 3. Other Indicia of Supervisory Status

The Employer further argues that other supervisory indicia support its contention that the System Operators are statutory supervisors. Other than the conclusory testimony of Vice President for Electric & Gas Operations Michael Sullivan, that System Operators have the authority to recommend discipline, promotion, layoff and the granting of time off, which was contradicted by Senior System Operator Jim Luciani, the Employer offered no testimony or documentary evidence concerning actual exercise of such authority to support these assertions. Such conclusory evidence does not establish supervisory status. *Golden Crest Healthcare Center, supra* at 729 (2006); *Avante at Wilson, Inc., supra* at 1057; *Chevron Shipping Co., supra* at 381 fn. 6.

There is no evidence that System Operators have the authority to discipline employees, or to effectively recommend such discipline. While System Operators may report field employees' work deficiencies to Field Supervisors or Shift Managers, there is no evidence that such reports result in discipline to field employees. It is also clear that should discipline result, it is determined by the Field Supervisor, and System Operators have no involvement in that decision.

The undisputed evidence establishes that System Operators do not have the authority to hire or recommend hire of employees. While one System Operator has voluntarily served on interview panels a handful of times over five years, he is the only one of the 16 System Operators who has done so. Further, there is no evidence that he has authority to make hiring recommendations, or that he has in fact done so. There is similarly no evidence that System Operators have the authority to promote or lay off employees, grant them time off or authorize overtime, and they do not evaluate employees or adjust their grievances.

### 4. Secondary Indicia of Supervisory Status

Finally, the Employer argues that the fact that System Operators are salaried employees and eligible for managerial benefits such as annual bonuses and stock options supports a finding that they are statutory supervisors. Absent evidence that an individual possesses any one of the primary indicia enumerated in Section 2(11) of the Act, such secondary indicia alone are insufficient to establish supervisory status. *Ken-Crest Services*, 335 NLRB 777, 779 (2001); *Billows Elec. Supply of Northfield, Inc.*, 311 NLRB 878 fn. 2 (1993); *Juniper Industries, Inc.*, 311 NLRB 109, 110 (1993).

In any event, evidence of a higher salary is insufficient to support a finding of supervisory status. *Wilshire at Lakewood*, 343 NLRB 141 (2004). Moreover, System Operators earn \$88,000-\$120,000 per year based upon their experience level. Dispatchers, who perform similar work, earn \$76,960-\$91,520 based upon a 40-hour week. Therefore, a Senior Dispatcher earns more than a System Operator based upon straight time alone, and may earn even more if overtime is included. Additionally, bargaining unit employees at the high end of the wage spectrum (\$53/hour) earn \$110,240 annually at straight time. This amount falls on the higher end of the System Operator's salary range. Given these respective earnings, there is insufficient evidence to conclude there is a significant difference in compensation between System Operators and other bargaining unit employees, or that this difference would support a supervisory finding.

### C. Appropriate Voting Group

Although the Employer has not argued to the contrary, I find that the System Operators share a community of interest with the employees in the established operation, production and maintenance bargaining unit and constitute a distinct segment of the Employer's employees which is an appropriate voting group. The System Operators are functionally integrated with the existing bargaining unit employees as they all share a common goal of maintaining the Employer's distribution system in a safe and efficient manner. The System Operators have regular and frequent contact with the Field Supervisors and field employees. Significantly, System Operators share a common purpose and have frequent contact with the Dispatchers, with whom they work side by side in the control room. The System Operators and Dispatchers have comparable work duties and responsibilities, and they share similar skills and qualifications. The System Operators and bargaining unit employees also share common supervision, as the Shift Managers and Work Management Coordinator are responsible for supervising the control room and the field employees. As stated above, the salaries of the System Operators are comparable to the wages of the many of the bargaining unit employees, including the Dispatchers who perform similar work.

The Employer contends that because the System Operators are not currently represented at PHI's other facilities, and previously have not been included in the operating, production and maintenance bargaining unit at ACE, Petitioner should be precluded from including them in the existing unit. Additionally, the Employer appears to argue that IBEW Local 1238's agreement to remove the System Operators from its operating, production, and maintenance bargaining unit at Delmarva in 2011 should preclude the petition here. However, Petitioner is not bound by the agreements of its sister local in another state pertaining to a different employing entity, and the record contains no evidence that the Petitioner ever promised not to represent the System Operators at ACE. See *UMass Memorial Medical Center*, 349 NLRB 369 (2007).

Based on the above, including the common supervision, regular contact, comparable compensation, shared purpose, and similarity of duties between the System Operators and the other employees, and in particular the Dispatchers, I find that the System Operators share a community of interest with the employees in the existing bargaining unit. *International Bedding, supra*. I further find that the System Operators constitute an "identifiable, distinct segment so as to constitute an appropriate voting group," which shares a community of interest with the employees in the existing bargaining unit. Accordingly, an *Armour-Globe* election is appropriate. *Warner-Lambert Co., supra*; *International Bedding, supra*. Accordingly, I shall order an *Armour-Globe* election to determine whether the System Operators wish to be included in the existing bargaining unit.

## VI. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:



1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Petitioner is a labor organization which claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time System Operators and Senior System Operators employed by the Employer at its 5100 Harding Highway, Mays Landing, New Jersey facility; **excluding** all other employees, guards, and supervisors as defined in the Act.

### **DIRECTION OF ELECTION**

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by **International Brotherhood of Electrical Workers, Local 210** as part of the existing unit of employees in the following departments represented by International Brotherhood of Electrical Workers, Local 210: Overhead Lines; Buried Distribution; Underground; Substation; Metered Services; Substation Operator; Service Building Attendant; Electric Systems Operations; Landscape Gardening; Radio Interference; Generation Fuel Handling; Systems Operations; Survey; Facility Services; Relay; Communications; Generation Maintenance; Generation Electrical; Generation Operating; Generation Results; Heavy Hauling; Combustion Turbine; Stores; Transportation; and Drafting & Design.

#### **A. Election Details**

The election will be held on **Monday, March 27, 2017**, from 5:00 p.m. to 7:00 p.m. in "Conference Room C" on the first floor of the Employer's facility located at 5100 Harding Highway, Mays Landing, New Jersey.

#### **B. Voting Eligibility**

Eligible to vote are those in the unit who were employed during the payroll period ending **March 8, 2017**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Also, eligible to vote using the Board's challenged ballot procedure are those individuals employed in the classifications whose eligibility remains unresolved as specified above and in the Notice of Election.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

### C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the Regional Director and the parties by **Tuesday, March 21, 2017**. The list must be accompanied by a certificate of service showing service on all parties. **The Region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at [www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015](http://www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015).

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at [www.nlr.gov](http://www.nlr.gov). Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not

object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

#### **D. Posting of Notices of Election**

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

#### **RIGHT TO REQUEST REVIEW**

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this Decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to [www.nlr.gov](http://www.nlr.gov), select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated: March 17, 2017

A handwritten signature in black ink, appearing to read "Dennis P. Walsh", written over a horizontal line.

**DENNIS P. WALSH**

Regional Director, Region Four  
National Labor Relations Board

**CERTIFICATE OF SERVICE**

I, Julia S. Sturniolo, for Atlantic City Electric Company, hereby certify that a copy of the foregoing Request for Review of the Acting Regional Director's Decision and Direction of Election was electronically filed on the NLRB's e-filing system and served via electronic mail and U.S. mail, upon the following:

Dennis P. Walsh  
Regional Director, Region 4  
615 Chestnut Street, 7th Floor  
Philadelphia, PA 19106  
[dennis.walsh@nrlb.gov](mailto:dennis.walsh@nrlb.gov)

Kevin D. Jarvis, Esquire  
O'Brien, Belland & Bushinsky, LLC  
1526 Berlin Road  
Cherry Hill, NJ 08003  
[kjarvis@obbblaw.com](mailto:kjarvis@obbblaw.com)

Anthony Petito, Business Manager  
IBEW Local 210  
308 New Jersey Avenue  
Absecon, NJ 08201  
[ap210@comcast.net](mailto:ap210@comcast.net)

Dated: July 23, 2018

By: /s/ Julia S. Sturniolo